89-1591

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS R. SCHWARZ,
Petitioner,

vs.

THE FLORIDA SUPREME COURT,
acting by Justices Raymond Ehrlich, Ben F. Overton, Leander J. Shaw, Rosemary Barkett, Stephen H. Grimes & Gerald Kogan, Dissent by Parker Lee McDonald,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

The decision of the court below, review of which is sought, directly concerns the federal issue raised in this petition, to-wit: (1) The conditions under which and the scope of permissible intrustion — if any — by a state regulatory body into the rights secured by the First and Fifth Amendments to the United States Constitution to persons forced to associate and not free to protest by withdrawal; and, (2) The delegation to private persons (the "Florida Bar" management) of the power to determine whether or not to compel the political association of licensees under amorphous and uncertain directions from the delegative authority and beyond the scope of the powers of the court to regulate and license attorneys and administer and supervise courts.

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

DECISION BELOW

The decision of the Florida Supreme Court, review of which is sought, is reported as *The Florida Bar Re Schwarz,* 552 So.2d 1094 (Fla. 1989), Timely rehearing denied December 19, 1989.

An intermediate decision is reported at 526 So.2d 56 (1988) and is reproduced and attached as Appendix E to this petition.

The decision reported at 552 So.2d 1094, including dissent, is reproduced and attached as Appendix F to this petition.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C., Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this case are the First, Fifth, and Fourteenth Amendments to the United States Constitution. The Florida statutory matter at issue is the "Rules Regulating the Florida Bar," Chapter 1, Section 2-3.2(c); Chapter 1-2.

STATEMENT OF THE CASE

This cause originated as an ex parte petition filed by Thomas R. Schwarz in the Florida Supreme Court. Petitioner Schwarz is an attorney licensed to practice law in Florida continuously since 1970. As a licensed attorney, petitioner is compelled by the Florida Supreme Court in the exercise of its implied legislative power to regulate and license attorneys to become a member of "The Florida Bar." He is required to pay an annual license fee. "The Florida Bar" activities and its rules for members are legislated and adopted by the order of the Florida Supreme Court. This body of law is known as "Rules Regulating the Florida Bar."

"The Florida Bar" is a sui generis institution created by The Florida Supreme Court in 1949. That court found constitutional powers to exist by implication for its creation of "The Florida Bar." *Petition of Florida State Bar Association,* 49 So.2d 902 (Fla. 1949).[1] The present constitutional provisions relevant

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[1] This Court presently has before it the case of *Keller v. California Bar*. That case differs from this in that the California Bar, unlike the "Florida Bar," is a corporation created by the legislature and derives powers from it and the California Supreme Court. The instant case involves pure exercise by the Florida Supreme Court of legislative regulatory power prohibited to it by the Florida constitution.

thereto are found in Article I, Sections 2 and 3, Article II, Section 3, and Article V, Section 15 of the Florida Constitution.

The ex parte petition requested that the Florida Supreme Court adopt proposed amendments to the "Rules Regulating the Florida Bar" set out in the petition. These proposed rule amendments specifically defined the scope of political activity in which the "Florida Bar" might engage and the methods and procedures it would be required to follow. In the alternative, the petition requested that the Florida Supreme Court create and receive recommendations from an independent study commission, and then act.

The petitioner's standing and use of the ex parte form of petition grew out of the failure of the "Florida Bar" to submit the proposed rule amendments to its annual membership meeting as required by the "Rules Regulating the Florida Bar," Rule 2-10.2.

The Florida Supreme Court issued its order directed to the "Florida Bar" to show cause why the ex parte petition should not be granted. The "Florida Bar" filed its response substantially admitting the factual allegations. It opposed the request for specific definition of its political activity powers. The ex parte petition, the court's order to show cause, and the response of the "Florida Bar," are reproduced as Appendices A, B, and C to this petition. The petitioners reply to the response is reproduced as Appendix D to this petition.

The issues were argued before the Florida Supreme Court. The latter subsequently issued an order referring the matter for study to The Florida Judicial Council, which was directed to file its report by January 1989. *The Florida Bar Re Schwarz,* 526 So.2d 56 (Fla. 1988). Adoption of the recommendations of the Florida Judicial Council was set for argument before the Florida Supreme Court on June 5, 1989. Various parties were permitted to appear, pro and con, including one Joseph W. Little,

supporting the petitioner.[2] The court thereafter issued its opinion adopting certain recommendations of the Council with respect to the matter and, on December 19, 1989. denied Little's timely motion for rehearing and clarification. The opinion and decision became the final action of the Florida Supreme Court on December 19, 1989. *The Florida Bar Re Schwarz,* 552 So.2d 1094 (Fla. 1989).

This petition for certiorari review follows.

QUESTIONS PRESENTED FOR REVIEW

The decision of the court below, review of which is sought, directly concerns the federal issue raised in this petition, to-wit: (1) The conditions under which and the scope of permissible intrustion — if any — by a state regulatory body into the rights secured by the First and Fifth Amendments to the United States Constitution to persons forced to associate and not free to protest by withdrawal; and, (2) The delegation to private persons (the "Florida Bar" management) of the power to determine whether or not to compel the political association of licensees under amorphous and uncertain directions from the delegative authority and beyond the scope of the powers of the court to regulate and license attorneys and administer and supervise courts.

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[2] The ex parte petition to the Florida Supreme Court sought only action by that court. The Florida Bar was invited by the show cause order to participate and the following individuals were permitted participation: The Florida Bar, The Florida Bar Center, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; Barry Richards, Counsel, 101 E. College Ave., Tallahassee, Florida 32302; Joseph W. Little, College of Law, University of Florida, Gainesville, Florida 32611; Ben L. Bryan, Jr., P.O. Box 1000, Ft. Pierce, Florida 34954; and Henry P. Trawick, Jr., 2051 Main Street, P.O. Box 4019, Sarasota, Florida 34230.

REASONS FOR GRANTING THE WRIT

Among the considerations governing certiorari review, Supreme Court Rule 17(b) lists the circumstance wherein a state court of last resort has decided a federal question so as to conflict with another state court of last resort or a Federal Court of Appeals. As a ground for review Rule 17(b) includes decision by a state court of last resort of an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court.

All three of such bases for review are present in this case.

I.

THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF THE UNITED STATES COURTS OF APPEAL

In its decision in *The Florida Bar Re Schwarz,* 552 So.2d 1094 (Fla. 1989), the Florida Supreme Court has exercised its implied legislative power to regulate petitioner and its more than 40,000 licensees. In doing so, it has created a direct conflict between itself and this Court and the United States Court of Appeals for the First and Eleventh Circuits, as well as numerous Federal District Courts.

A. In the exercise of its legislative function regulating attorneys and the practice of law, the Florida Supreme Court has forced licensees to associate with and fund its administrative arm, the "Florida Bar." It has created a forced political association. It has delegated to private citizens (the "Florida Bar" management) the power to force licensee engagement in political activity without meaningful definition of its scope, mode, or method of exercise and without relation to its licensing, regulatory, or administrative powers.

This action conflicts directly with the limiting doctrines of vagueness and broadness of intrusion on First Amendment

rights by state action. This doctrine is set out by this Court in *United States v. Robel,* 389 U.S. 258 (1967) L.C. 275, 276 (citations omitted).

> "The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights, as does ~~§ 5(a)(1)~~(D). . . . This is because the numerous deficiencies connected with vague legislative directives whether to a legislative committee, . . . to an executive officer, . . . or to private persons, . . . are far more serious when liberty and the exercise of fundamental rights are at stake. . . .
>
> * * * * * *
>
> . . . Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. "[S]tandards of permissible statutory vagueness are strict * * *" in protected areas. NAACP v. Button, 371 U.S., at 432, 83 S.Ct., at 337, 9 L.Ed.2d 405. "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them." Greene v. McElroy, 360 U.S. 474, 507, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377."

Robel, supra, at 275-276.

These doctrines are embodied in other decisions of this Court beginning with *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Dombroski v. Pfister,* 380 U.S. 479, 491; *Grayned v. City of Rockford,* 408 U.S. 104 (1972); and others.

In *Gibson v. Florida Bar,* 798 F.2d 1564 (CCA 11, 1986), the Eleventh Circuit declared the phrases "advancement of the science of jurisprudence" and "administration of justice" to be "amorphous." Having no form, such a description of the scope of intrusive activity affecting First Amendment rights of the petitioner and others conflicts with the foregoing decisions of this Court.

The provisions for partial refund to licensee-objectors do not overcome the basic infirmities of forced political association grounded in vagueness and overbroadness. An undefined predicate cannot form the basis for intrusion into First Amendment rights of free political association. The decision of the Florida Supreme Court to the contrary conflicts with this Court's ruling in *Cantwell v. Connecticut,* 310 U.S. 296, 317; *NAACP v. Button,* 371 U.S. 415, 433; and others.

Where the scope of delegated power to intrude in the First Amendment area is vague and without meaningful definition, the attempted delegated exercise of that power is so pervasive as to be unconstitutional. The decision of the Florida Supreme Court to the contrary conflicts with the rulings in *Romany v. Colegio de Abogados de Puerto Rico,* 742 F.2d 32 (CCA 1, 1984); and, on second review, *Schneider v. Colegio de Abogados de Puerto Rico,* 682 F.Supp. 674 (DDR 1988).

B. The forced association of more than 40,000 licensees is compelled by the Florida Supreme Court. Licensees are forced to be associated with the political views of the private citizens managing the "Florida Bar." This compulsion lends to those views a power and effectiveness drawn at least in part from unwilling licensees. This Court has for many years recognized that, in the political arena, advocacy of public and private points of view is "enhanced by group association": *Buckley v. Valeo,* 424 U.S. 1 LC 15.

> "The First Amendment protects political association as well as political expression. The constitutional

> right of association explicated in *NAACP v. Alabama,* 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee " 'freedom to associate with others for the common advancement of political beliefs and ideas,' " a freedom that encompasses " '[t]he right to associate with the political party of one's choice.' " *Kusper v. Pontikes,* 414 U.S. 51, 56, 57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973), quoted in *Cousins v. Wigoda,* 419 U.S. 477, 487, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975)."

Buckley v. Valeo, 424 U.S. 1 (1976); see also, *Clean Up 84 v. Heinrich,* 759 F.2d 1511, 1513 (CCA 11, 1985).

No procedural device can eliminate the association by the public of dissenting members with political views abhorrent to them. Where the delegation of power to Bar management is vague and indefinite and the association is compelled, the invasion of free association is a fait accompli. No post hoc due process can alter that fact.

This case thus presents to the Court the opportunity to decide these fundamental and underlying constitutional principles as they relate to Bar regulation throughout the United States. Absent such decision, a plethora of cases involving particular political or social association activities will perforce continue to be spawned. The state courts, with or without approval or sanction by the legislative branch, consistently refuse to provide specifics or definition of their claimed powers delegated to their associations. Lack of definition of underlying power leaves the petitioner and the hundreds of thousands of others similarly situated in forced association with abhorrent ideological positions. Under the Florida Supreme Court criteria even the

Delphic oracle or the all-seeing prophet cannot know the basis for intrusion into constitutional rights or what compelling state interest justifies it. The ex parte petition in this case and the "Florida Bar's" response to the Florida Supreme Court's show cause order illustrate the range and extent which such intrusions take.

CONCLUSION

The conflict of opinions of this and other federal courts with the Florida Supreme Court on the propriety of intrusion of the First and Fifth Amendment rights of lawyers by compulsory Bar associations (governmental courts) is clear. Some such agencies reject analagous decisions of this Court. Others have attempted reconciliation. None, however, have examined the fundamental relationship between the source of supposed power, its delegation, and the restrictions upon that delegation. The phrase "promote the science of jurisprudence" was properly held by the Eleventh Circuit to be "amorphous." *Gibson, supra.*

Formless phrases cannot be utilized to define areas in which delegated legislative activity may deprive individuals of property and compel their ideological association with a class from which there is no escape.

The treatment of underlying basic limits on the compulsory membership in integrated Bar associations, postponed in this Court's decision in *Lathrop v. Donahue,* 367 U.S. 820 (1961), is now ripe for decision.

The justification for the independence of the Judiciary in #78 Federalist Papers, on the ground that the independent Judiciary would have no sword or purse, is threatened. Through the integrated "Florida Bar," the Florida Supreme Court has created a purse of millions of dollars unaccountable as state revenue. It has through its arm, the "Florida Bar," engaged in political wars. It has taken up the sword of unrestrained political propa-

ganda in all fields of substantive law, unrelated to the regulation of attorneys, function of the courts, or the administration of the laws of the state. This is shown by the ex parte petition in this case and the "Florida Bar's" response to the show cause order. The subject matter of forced political association and its range is not contested.

Regardless of post hoc refund of any pro rata contribution to funding, all licensees are by forced association tarred with the same political brush. Petitioner and dissenters are represented to the public as supporting or opposing particular political positions. Court interference through "Florida Bar" political activity is particularly offensive when applied to popular initiative situations — initiative which is intended to be preserved exclusively to the people by Article I of the Florida Constitution.

Petitioner prays that this Court issue its writ to the Florida Supreme Court, review its decision, and require it to define or define for the Florida court the meaningful and permissible limits of the scope, manner, and method in intruding upon petitioner's First and Fifth Amendment rights. Such a decision would provide much-needed and suitable guidance for courts regulating hundreds of thousands of lawyers throughout the United States.

DATED: March 19, 1990.

Respectfully submitted,

THOMAS R. SCHWARZ
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Lauderhill, Florida 33351
Telephone: (305) 742-6979

By: Thomas R. Schwarz

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA

In Re:

Ex Parte Petition of Thomas R. Schwarz

EX PARTE PETITION OF THOMAS R. SCHWARZ

(Filed June 4, 1987)

COMES NOW THOMAS R. SCHWARZ, Florida Bar No. 129383, and respectfully petitions this Court to forthwith consider such procedures as are prayed for herein or as it otherwise deems appropriate, the amendments to the Rules Regulating The Florida Bar proposed in the Exhibits attached to this petition.

As grounds therefor, your petitioner states as follows:

1) By letters to the Executive Director of The Florida Bar on February 2, 1987 and pursuant to the provisions of Rules 2-10.1 and 2-10.2, petitioner proposed amendments to the Rules Regulating The Florida Bar. The proposal under Rule 2-10.1 is marked as Exhibit I to this petition. The proposal under Rule 2-10.2 is marked as Exhibit II.

2) Pursuant to Rule 2-10.1, the Exhibit I proposal was directed to the Board of Governors of The Florida Bar for consideration.

3) Pursuant to Rule 2-10.2, the Exhibit II proposal was directed for consideration of the next general membership meeting of The Florida Bar.

4) The proposed amendments relate to definition and limitation of the scope and procedure for the exercise of political power by this Court's official arm, and to democratization of the Rule amendment process.

5) Upon receipt of these letters and proposed amendments, pursuant to communication by telephone and letter with the Executive Director of The Florida Bar, it was agreed that the proposal before the Board of Governors would be taken up at its May 1987 meeting - later advanced to the March 1987 meeting in Tallahassee. The proposals were at that meeting referred to the Legislative Committee for consideration.

6) No discussion or correspondence was had by your petitioner with the Executive Director with respect to disposition of the Exhibit II proposal.

7) Your petitioner had adopted the dual-procedure approach as a courtesy to the Board of Governors, the leadership of which was on record as opposed to limitation of its political activity and democratization of voting on the amendment process.

8) At that time and to date, after some ten months, the Board of Governors has not complied with the mandate of the United States Court of Appeals for the Eleventh Circuit regarding political funding, one narrow area of the proposed amendments relating to political activity.

9) Through misunderstanding, confusion in communication, or otherwise, the proposed amendments embodied in Exhibit II have not been published in The Florida Bar News as required by Rule 2-10.2(b) nor in any official program as required by Rule 2-10.2(c). Petitioner has been deprived of his rights under the Rules to have such amendments considered at the regular meeting of The Florida Bar scheduled for June 10 - 14, 1987).

10) On May 14, 1987 the Board of Governors' meeting to consider the regular report of the Legislative Committee took the following action:

(a) Reviewed the television commercials designed to create public political support for its sales tax position in the Legislature and for court action;

(b) Considered means of coordinating and allying its actions on the sales tax exemption with other groups;

(c) Voted to take political action, among others, on various legislative proposals ranging from (i) Lien priority on vessels polluting by oil spills; (ii) Negligence standards for acts in emergencies; (iii) Service of process on corporate defendants; (iv) Insurance requirements for hospitals and physicians with respect to tort actions.

(d) These actions were urged on the basis of:

I) Ad hominem arguments including

A. Neurosurgeons were engaged in a conspiracy;

B. The Legislative Committee which had considered the matter was stacked by having on it only two representatives of the Academy of Florida Trial Lawyers, a plaintiff's organization;

C. The insurance companies providing medical malpractice coverage were gouging the public, making unconscionable profits.

II) Fatuous legal arguments

A. If the practice group of physicians at risk was too small, simply include others in the group;

B. fixing different standards of care for acts in emergencies was unknown historically and would deny access to the courts;

(e) In each case the charade of a vote that the matter came within the "purview" of this Court's delegation of power to the Board, was taken - the charade growing out of this Court's failure by its rules to place limits or define the scope of its delegation of political power to its official arm.

(f) Took no action on the amendments proposed by your petitioner.

11) This Court has full and exclusive power to consider these amendments to its Rules as proposed by petitioner on petition or sua sponte.

12) Petitioner states that:

(a) The constitutional provisions of Articles I, II, and III of the Florida Constitution.

(b) The provisions of Amendments I, IV, and V of the United States Constitution, and

(c) Avoidance of the scandal, impropriety, and appearance of impropriety stemming from this Court's justices judging their own cases all require that this Court define and limit the political activity delegated to its arm.

13) This Court, acting by and through its official arm in a claimed exercise of political power undefined as to scope, has used its funds, prestige, private lobbyists, public relations firms, and publicized specious social arguments deemed appropriate in political activity in an unsuccessful but continuing effort to persuade the Legislature to restore the exemption from sales tax on the fees of private lawyers.

14) This Court, acting by and through its official arm, is now attempting to pursue its unsuccessful political aims by using its funds, power, prestige, facilities, and personnel to initiate and prosecute a lawsuit in the Circuit Court of Leon County - a court which functions under the superintending control of this Court. The matter is ultimately to be decided in this Court.

15) The complaint in the Leon County action has not been published in the Florida Bar News, this Court's official publication. From general press reports your petitioner believes it is predicated in substantial part on legal principles urged against nondiscriminatory taxes which were rejected seventy-five years

ago. It is consistent with the efforts of other groups to preserve special tax privileges.

16) This situation is a rerun of the political, then legal, action in connection with the 1984 Amendment 9 initiative and is an inevitable consequence of this Court's engagement in the exercise of political activity of undefined and unlimited subject matter scope. The socio-historic political arguments were as specious in 1984 as they are now, and were called to the Court's attention by letter of February 1985.

17) Your petitioner states that while the Federal courts may fashion limited and ad hoc remedies at the petition of this Court's law licensees, in such contests this Court uses its funds, power, personnel, and prestige in attempts to prevent the effectiveness of such actions. The petitioner and others similarly situated have no adequate remedy in the unfair and unequal access to such courts by virtue of the inequality of resources available from this court.

18) Your petitioner states that his forced association with this Court's arm in its political activity is regarded as dishonorable as to him and others similarly situated.

19) Your petitioner states that:

(a) Only this Court can provide actions suitable to removal of (i) The impropriety of judging its own cause in political activity; (ii) The sense of dishonor associated with forced association in political activity; (iii) The obstacles to independent, equal, and fair examination of the systemic consequences in the continuation of the claim to unbridled political activity of its arm;

(b) Only this Court can decide to continue to draft its law licensees into an army of unwilling soldiers and sunshine politicians, or to commission them as officers of a court of law;

(c) Only this Court can obviate by system treatment the use of the Federal courts on an ad hoc basis for establishment of limits and procedures on its political activities;

(d) Only this Court can remedy in particular the deprivation of petitioner's right to propose amendments to the general membership of its arm - such deprivation occasioned by misunderstanding, mistake, or otherwise of the administrators of its official arm.

WHEREFORE, your petitioner respectfully prays that:

A) The Court appoint and fund an independent commission having a six-month life, with its mission

(1) To study and report on the legality, propriety, scope, and procedures, if any, through which this Court may exercise political power considering Articles I, II, and V of the Florida Constitution, the Code of Judicial Conduct, and such other materials and ethical principles as it may deem appropriate.

(2) To recommend to the Court the adoption of the rules herein proposed or such others if and as the independent commission may deem appropriate.

(3) To have representation on such commission of the Law Schools and Political Science Schools of the University of Florida, Florida State University, the Legislature, the Attorney General, the Court's arm, the media, your petitioner, or other parties the Court may deem interested and knowledgable in the subject matter.

(4) And for such other and further relief as may seem meet and proper in the circumstances.

Respectfully submitted,

THOMAS R. SCHWARZ
(Fla. Bar #29383)
4561 N.W. 79th Avenue
Lauderhill, Florida 33321
(305) 742-6979

/s/ Thomas R. Schwarz

EXHIBIT I

THOMAS R. SCHWARZ
Attorney and Counsellor at Law
4561 Northwest 79th Avenue
Lauderhill, Florida 33321
(305) 742-6979

February 2, 1987

Mr. John Harkness
Executive Director of the Florida Bar
The Florida Bar Center
Tallahassee, Florida 32301-8226

Dear Mr. Harkness,

Thomas R. Schwarz, Bar #129383, proposes the following amendments to the rules regulating the Florida Bar pursuant to Rule 2-10.1.

First: It is proposed that Chapter 2, Section 2-3.2(c)4, be amended by adding to that section after the semi-colon the following language to wit:

(a) provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public relations activity in association with any pro-

gram developed under this section nor contributed to any Political Action Committee.

(b) Nothing in this section shall inhibit or prohibit or prevent any member officer or employee of the Florida Bar from freely expressing his or her private support, opinion, or advice on any current proposed or contemplated law or legislation in such fashion as she or he shall choose.

Second: It is proposed that Chapter 2, Section 2-10.2 and Section 2-10.2(a), in the following particulars to wit:

(a) By deleting from Section 2-10.2 the language "present and voting".

(b) By adding the following language to Section 2-10.2(a).

(1) The executive director shall prepare a ballot, yea or nay, on each proposed amendment and shall not less than 45 days prior to the commencement of the meeting at which the amendment is to be considered, send such ballot to all members of the Florida Bar.

(2) Ballots may be voted by mail returned to the Executive Director, postmarked not less than 7 days prior to the commencement of the meeting. Ballots may be voted at the meeting by depositing the same with the Executive Director within the first three hours after the opening of the meeting.

(3) The Executive Director shall thereupon tabulate the vote and certify such tabulation at the first session of the second day of such meeting.

(4) Adoption of rejection shall be on the basis of a majority vote. Upon a tie vote the proposed amendment fails.

Very truly,

Thomas Rowe Schwarz

EXHIBIT II

THOMAS R. SCHWARZ
Attorney and Counsellor at law
4561 Northwest 79th Avenue
Lauderhill, Florida 33321
(305) 742-6979

February 2, 1987

Mr. John Harkness
Executive Director of the Florida Bar
The Florida Bar Center
Tallahassee, Florida 32301-8226

Dear Mr. Harkness,

Thomas R. Schwarz, Bar #129383, proposes the following amendments to the rules regulating the Florida Bar pursuant to Rule 2-10.2.

First: It is proposed that Chapter 2, Section 2-3.2(c)4, be amended by adding to that section after the semi-colon the following language to wit:

(a) provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public relations activity in association with any pro-

gram developed under this section nor contributed to any Political Action Committee.

(b) Nothing in this section shall inhibit or prohibit or prevent any member officer or employee of the Florida Bar from freely expressing his or her private support, opinion, or advice on any current proposed or contemplated law or legislation in such fashion as she or he shall choose.

Second: It is proposed that Chapter 2, Section 2-10.2 and Section 2-10.2(a), in the following particulars to wit:

(a) By deleting from Section 2-10.2 the language "present and voting".

(b) By adding the following language to Section 2-10.2(a).

(1) The executive director shall prepare a ballot, yea or nay, on each proposed amendment and shall not less than 45 days prior to the commencement of the meeting at which the amendment is to be considered, send such ballot to all members of the Florida Bar.

(2) Ballots may be voted by mail returned to the Executive Director, postmarked not less than 7 days prior to the commencement of the meeting. Ballots may be voted at the meeting by depositing the same with the Executive Director within the first three hours after the opening of the meeting.

(3) The Executive Director shall thereupon tabulate the vote and certify such tabulation at the first session of the second day of such meeting.

(4) Adoption or rejection shall be on the basis of a majority vote. Upon a tie vote the proposed amendment fails.

Very truly,

Thomas Rowe Schwarz

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JUNE 16, 1987

The Florida Bar

Re: Thomas R. Schwarz

Case No. 70,702

ORDER TO SHOW CAUSE

WHEREAS, the Court has determined that the Petition demonstrates a preliminary basis for relief, this is to command The Florida Bar to show cause on or before July 1, 1987, why the Petition should not be granted. Petitioner may serve his response on or before July 13, 1987.

/s/ Sid J. White
Clerk of the Supreme Court of Florida

A True Copy

TEST:

Sid J. White sg
Clerk Supreme Court. cc: Honorable John F. Harkness, Jr.
Thomas R. Schwarz, Esquire
John A. Boggs, Esquire

SUPREME COURT OF FLORIDA
Tallahassee 32301

June 16, 1987

Sid J. White
Clerk
Debbie Causseaux
Chief Deputy Clerk

Telephone
904-488-0125

Honorable John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: The Florida Bar, Thomas R. Schwarz
Case No. 70,702

Dear Mr. Harkness:

Please find enclosed herewith the original and copy of the Order to Show Cause in the above cause. Please endorse your acceptance of service on the original and return same to this office.

Thank you for your cooperation in this matter.

Most cordially,

Sid J. White
Clerk Supreme Court

SJW: sg
Enclosure

cc: Thomas R. Schwarz, Esquire
John A. Boggs, Esquire

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

Case No. 70,702

THE FLORIDA BAR,

Re: Thomas R. Schwarz

RESPONSE TO ORDER TO SHOW CAUSE

(Filed July 27, 1987)

Respondent, THE FLORIDA BAR ("the Bar"), hereby responds to the Ex Parte Petition of Thomas R. Schwarz and this court's Order to Show Cause, and respectfully states:

RESPONSE TO ALLEGATIONS OF PETITION

1. The Bar admits Petitioner's allegations concerning the existence and substance of the cited letters marked as Exhibits I and II to the Ex Parte Petition of Thomas R. Schwarz.

2. The Bar admits that Petitioner's correspondence marked as Exhibit I was to be ultimately considered by the Board of Governors of The Florida Bar under Rule 2-10.1 of the Rules Regulating The Florida Bar ("Bar Rules").

3. The Bar admits that Petitioner's correspondence marked as Exhibit II was to be ultimately considered at the next General Membership Meeting of The Florida Bar under Bar Rule 2-10.2.

4. The Bar admits that Petitioner's proposed amendments seemingly relate to a definition and limitation of the scope and procedure for the exercise of political power by The Florida Bar as an official arm of the Supreme Court of Florida; the Bar denies that such amendments necessarily relate to any "democratization" of the Bar's rule amendment process.

5. The Bar admits Petitioner's allegations concerning the disposition by the Board of Governors of his proposal contained in Exhibit I.

6. The Bar admits Petitioner's allegations concerning the disposition of his proposal contained in Exhibit II.

7. The Bar is without knowledge of Petitioner's motive for seeking the proposed amendments to various Bar Rules; the Bar denies that its leadership is on record as opposed to limitation of its political activity and democratization of voting on the amendment process.

8. The Bar denies that its Board of Governors has not complied with the mandate of the United States Court of Appeals for the 11th Circuit regarding political funding; the Bar admits that political funding constitutes at least one area of Petitioner's proposed amendments contained in Exhibits I and II.

9. The Bar admits Petitioner's allegations concerning the disposition of his proposal contained in Exhibit II.

10. The Bar admits that on May 14, 1987, its Board of Governors met to consider the regular report of its Legislation Committee:

a. The Bar denies that its Board of Governors reviewed television commercials designed to create political support for its sales tax position in the legislature and for court actions — the Board merely viewed various television news accounts of the Bar's circuit court litigation to challenge the application of the Florida Sales Tax to certain legal services;

b. The Bar admits its Board of Governors considered means of coordinating and allying its actions on the sales tax exemption with other groups—but opted against such activity;

c. The Bar admits its Board of Governors authorized political action on various legislative proposals cited by Petitioner, including—

(i) legislation regarding lien priority on vessels polluting by oil spills (for the Corporation, Banking & Business Law Section of The Florida Bar, exclusively, to oppose with its own voluntary dues and independent funds, further contingent on the concurrence of both the Bar's Real Property, Probate & Trust Law and Environmental & Land Use Law Sections);

(ii) legislation regarding negligence standards for acts in emergencies (for The Florida Bar to actively oppose);

(iii) legislation regarding service of process on limited partnerships (for the Corporation, Banking & Business Law Section of The Florida Bar, exclusively, to oppose with its own voluntary dues and independent funds); and

(iv) legislation regarding insurance requirements for hospitals and physicians with respect to tort actions (for The Florida Bar to actively support).

d. The Bar admits Petitioner's allegations as to the general content of certain arguments, among many others, expressed during the Board's consideration of political action on various legislative proposals; the Bar denies Petitioner's argumentative characterization of such discussion as "ad hominem" or "fatuous."

e. The Bar admits that its Board, in consideration of political action on various legislative proposals, followed The Florida Bar's Legislative Policies & Procedures within Standing Board Policy 900 by confirming, through majority vote, that each matter was within the scope of the

authority of this organization under Bar Rules; The Bar denies Petitioner's argumentative characterization of such action as a "charade" and Petitioner's allegation that the Supreme Court of Florida has failed to place limits upon or define the scope of political power delegated to The Florida Bar.

f. The Bar admits Petitioner's allegations concerning the Board's disposition of his proposed amendments.

11. The Bar admits Petitioner's allegations concerning the Supreme Court of Florida's power to consider Petitioner's proposed amendments; the Bar denies such amendments are properly presented in this action under applicable Bar Rules.

12. The Bar denies that Petitioner's cited arguments require that the Supreme Court of Florida define and limit the political power delegated to The Florida Bar, premised on Petitioner's assumption that this Court has failed to place limits upon or define the scope of such power.

13. The Bar admits that it utilized funds in advocating the complete exemption for all legal services from the Florida Sales Tax; the Bar denies Petitioner's other argumentative allegations regarding its authority, means and methods for its legislative activity relating to the Florida Sales Tax; the Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida, as alleged by Petitioner.

14. The Bar admits that it, and other parties, initiated circuit court litigation to challenge the application of the Florida Sales Tax to certain legal services; the Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida, as alleged by Petitioner.

15. The Bar admits that the full text of its circuit court complaint has not been published in The Florida Bar *News*, although that legal action was the subject of a 27 column-inch story beginning at the top of page 1 of the May 15, 1987 *News*

issue; the Bar denies Petitioner's analysis and characterization of its legal argument espoused in that litigation.

16. The Bar denies Petitioner's additional argumentative characterization of its circuit court litigation, and Petitioner's continuing premise that this court has failed to place limits upon or define the scope of any political power delegated to The Florida Bar; the Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida, as alleged by Petitioner.

17. The Bar denies that its involvement in federal court actions cited by Petitioner prevents the effectiveness of any contest of its legislative activities; the Bar is without knowledge as to the adequacy of such federal court remedies as alleged by Petitioner, and is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida.

18. The Bar is without knowledge as to Petitioner's regard for his association with The Florida Bar and its political activities.

19. The Bar denies that the Supreme Court of Florida is the only source of relief for the alleged impropriety and wrong suffered upon Petitioner and others, and through its argument which follows will demonstrate this organization's continuing ability to responsibly provide such relief when appropriate.

ARGUMENT IN OPPOSITION TO PETITION

A. The Supreme Court of Florida has defined the scope of The Florida Bar's legislative activities.

Within the governing documents of The Florida Bar and the case law which has interpreted them, there is ample guidance from the Supreme Court of Florida and other courts as to the definition and scope of this organization's legislative activities.

The Bar's very existence as an integrated body resulted from a 1949 opinion of this Court acknowledging: "[The Bar] is not a

compulsory union but a necessary one to secure the composite judgment of the bar on questions involving its duty to the profession and the public." *Petition of Florida State Bar Association,* 40 So.2d 902, 908 (Fla. 1949).

This organization's current charter, approved by this Court on July 17, 1986, reiterates The Florida Bar's fundamental activities as an official arm of the Supreme Court of Florida: "The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." Rules Regulating The Florida Bar 1-2.

When presented with a proposal to prohibit The Florida Bar's engagement in any political activity or use of funds and personnel for such purpose, this Court reviewed eight representative legislative activities of the Bar — constitutional revision, two separate refinements of Article V, establishment of the District Courts of Appeal, merit rentention of appellate judges, creation of the Judicial Qualifications Commission, approval of the Interest on Trust Accounts program, and support of Florida Legal Services, Inc. — and concluded: "All the above enumerated political activities are closely related to lawyers' 'duty to the profession and the public,' synonyms, certainly, for the improvement of the administration of justice and the advancement of the science of jurisprudence." *The Florida Bar,* 439 So.2d 213, 214 (Fla. 1983).

B. The Supreme Court of Florida Has Limited the Scope of The Florida Bar's Legislative Activities.

Constrained by the purposes enumerated within its organic charter, The Florida Bar has promulgated additional policies which bear upon its legislative activities. Those, too, have been the subject of scrutiny by the Supreme Court of Florida. Standing Board Policies 900, "Legislative Policy and Procedure," in their present form show no material variance from the verbiage reviewed by this Court in 1983, prompting this observation:

> The significance of this legislative policy to the instant petition is that "[n]either The Florida Bar nor any of its committees or sections may take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Integration Rule." Standing Board Policy 900 §9.10(a). As a further safeguard, the Board of Governors, the legislation committee, and the executive committee allow any interested person to appear before it in support of or in opposition to any legislative proposal being considered. *Id.* §9.11(b). Petitioners have made known to this Court no individual who has been refused the opportunity to present his argument to any of the groups. Indeed, in some instances arguments have been presented to all three.
>
> Finally, petitioners are made cognizant of the fact that any attorney "is still free to voice his own views on any subject in any manner he wishes. He can do this even though such views be diametrically opposed to the position taken by the unified bar of his state." *In re Unification of the New Hampshire Bar,* 109 N.H. 260, 266, 248 A.2d 709, 713 (1968). This may take the form of working within the Bar itself or its committees or it may be through external means. But he is never forced to adhere to or proclaim any political view or engage in any personally-repugnant political activity.

The Florida Bar, 439 So.2d 213, 214-215 (Fla. 1983).

Continuing its analysis of the Bar's internal safeguards against capricious legislative involvement present within Standing Board Policies 900, this Court concluded:

> We therefore hold that, *as limited by the standing Board policy on legislation,* the political activities of the Board of Governors of The Florida Bar, including the expending of money and employing of personnel, are germane to the

> compelling state interest in the improvement of the administration of justice and the advancement of the science of jurisprudence and hence constitutionally permissible.

The Florida Bar, 439 So.2d 213, 215 (Fla. 1983) (Emphasis supplied).

C. The Florida Bar Continues to Seek Improvements in Its Legislative Procedures that are Reflective of Constitutional Requirements and Sensitive to Member Concerns

As indicated by the instant petition, the previously cited actions, and other proceedings in the federal courts, The Florida Bar's legislative activities have generated periodic opportunities for introspection and refinement in the face of member challenge. Indeed many integrated bars have witnessed this phenomenon of late: *Schneider v. Colegio de Abogados de Puerto Rico,* 565 F.Supp. 963 (D.P.R. 1982); *Arrow v. Dow,* 544 F.Supp. 458 (D.N.M. 1982); *Petition of Chapman,* 509 S.2d 753 (N.H. 1986); *Keller v. State Bar of California,* 226 Cal. Rptr. 448 (Cal. App. 3 Dist. 1986); *Falk v. State Bar of Michigan,* 411 Mich. 63, 305 N.W. 2d 201 (1981).

The most recent contest of The Florida Bar's legislative activities at the appellate level has occurred within the United States Court of Appeals for the 11th Circuit, stemming from a member challenge initiated in the United States District Court for the Northern District of Florida, in the case of *Gibson v. The Florida Bar,* 798 F.2d 1564 (11th Cir. 1986).

In remanding that action to the Northern District Court, the 11th Circuit acknowledged that the trial court's entry of a judgment in favor of The Florida Bar "was based on a review of the Bar's Policy 900" (*Id.* at 1569) a document with which the appellate court seemingly found no fault.

The 11th Circuit's resolution of *Gibson* included an analysis of United States Supreme Court cases upholding the constitu-

tionality of an integrated state bar and those involving the analogous situation where union members are required to favorably support union lobbying measures through compelled membership dues or agency shop fees. After repeated citations to *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) — which addressed whether union service fees compelled by law as a condition of continued employment could be used for political and idealogical purposes — the 11th Circuit concluded its opinion by noting what seems to be the current federal law applicable to legislative activities of any integrated bar:

> It should be stressed that this opinion addresses only the use of compelled fees by the Bar. *Abood* specifically noted that the union was free to politicize on any issue of interest to that group. *See* 431 U.S. at 235, 97 S.Ct. at 1799. Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. *Id.* Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.

Id. at 1569-1570.

Of further significance was the court's closing footnote, which observed:

> 5. Although the question of proper remedy is not before this court, this aspect of the *Abood* opinion suggests that the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program, but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying. [According to testimony at trial, each lawyer's share of the lobbying budget amounts to approximately $1.50]. Lawyers would only

> have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right not to disclose his benefits. *See Abood, supra,* at 241, n. 42, 97 S.Ct. at 1802, n. 42.

Id. at 1570 (footnote 5).

Consistent with the *Gibson* ruling, The Florida Bar has taken steps to fashion a "proper remedy" to address what the 11th Circuit termed "the difficult task of discerning proper Bar position issues."

At the Board of Governors September 18 & 19, 1986, meeting—just three days following rendition of the 11th Circuit *Gibson* opinion—Bar governors considered the various options for dealing with potential member objections to legislative positions taken on behalf of this organization. The Legislation Committee was directed to prepare a comprehensive report on both the "check-off" and "refund" systems, for action by the Board of Governors at its next scheduled meeting in November 1986.

Meeting during November 13-15, 1986, the Board of Governors approved the "refund" option, in concept, for resolution of member protests to legislative positions adopted on behalf of the Bar. The official Board minutes detailing the highlights of that suggested procedure were shared with the United States District Court for the Northern District of Florida, for consideration during a March 12, 1987, hearing on defendants' motion on the mandate in the *Gibson* proceeding.

Following that hearing, Judge Maurice Paul issued a March 13 order that the *Gibson* action be held in abeyance for 70 days to allow a written refund policy to be finalized by the Bar, for ultimate Florida Supreme Court approval. To allow for adequate member notice and to assure appropriate Florida Supreme Court review of such procedure, the Bar favored the codification of such refund policy as an amendment to existing Bar Rule 2-9.3 regarding "Legislative Policy."

However, due to the timing of Judge Paul's March 13 order and the advance scheduling of the March 19-21 regular Board of Governors meeting, the Bar was unable to consider the "refund" concept as a possible amendment to Chapter 2 of the Rules Regulating The Florida Bar. This was because of Bar Rule 2-10.1's requirement that: "Any member of The Florida Bar or any interested person may propose amendments to this chapter by delivering a copy of the proposed amendment to the executive director of The Florida Bar at least ten (10) days prior to any regular meeting of the Board of Governors." Rules Regulating The Florida Bar 2-10.1.

Nevertheless, in order to immediately commit The Florida Bar to a "refund" concept in dealing with legislative objections from its members, the Board of Governors approved in March a codified protest procedure—as an amendment within Standing Board Policies 900, "Legislative Policy and Procedure"—on March 20. To assure Florida Supreme Court review of that procedure, the Board of Governors also voted to proceed toward adoption and "elevation" of this identical verbiage—as an amendment to Bar Rule 2-9.3—at its May session, when the 10-day requirement of Bar Rule 2-10.1 could be met.

A report of that March Board action was provided to Judge Paul on April 1, along with a revised computation of the time necessary for the Bar's refund procedure: to be previewed by the general membership prior to Board consideration; to receive Board approval as a proposed rule amendment; to be republished in final text for additional membership consideration and feedback; and, presumably, to secure ultimate Florida Supreme Court approval, with or without member objections on file. That update resulted in a May 7, 1987, order from Judge Paul, extending the period to September 1, 1987, in which the Gibson case would be held in abeyance, premised upon final action by this Court adopting an official legislative objection procedure within Chapter 2 of the Rules Regulating The Florida Bar.

Upon the joint recommendation of The Florida Bar's Rules & Bylaws Committee and its Legislative Committee, the policy was approved as a proposed bylaw amendment at the Board of Governors May 14-15 session. The measure was duly noticed in appropriate member publications and is now before this Court in another proceeding: *See The Florida Bar; Re: Amendment to Bylaw 2-9.3 (Legislative policies)*. The text of that legislative objection procedure, as previewed in The Florida Bar *News* is attached hereto as Exhibit 1.

D. The Florida Bar's Current Legislative Procedures Appear Constitutionally Sound and Address Petitioner's Apparent Minority Position.

While yet to be sanctioned by this Court as a formal bylaw amendment within this organization's charter document, the Bar's procedure for resolving member challenges to specific positions taken in furtherance of its legislative program appears to be free of any constitutional defects. As noted previously, the Bar bound itself to such procedure in March 1987 upon its adoption of the measure as a Standing Policy of the Board of Governors.

That procedure is represented to be this organization's responsible creation of one "proper remedy" endorsed in *Gibson*, by applying the dictates of the United States Supreme Court's holding in *Chicago Teachers Union v. Hudson*, 475 U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) to this integrated state bar's particular legislative activities. Again, that issue is before this Court in another matter, and should influence further federal court review.

As current Bar policy, this legislative objection procedure as administered to date has necessitated two separate official notices of some 11 positions officially taken during this legislative session in the name of The Florida Bar. The initial April 1 notice within The Florida Bar *News* resulted in final pro-

tests from 12 of The Florida Bar's 40,000+ members regarding various of the seven legislative positions previewed; the second notice, on June 1, garnered seven member objections to the four measures highlighted as Bar positions. Final Bar action on those 19 cummulative objections resulted in decisions to refund a portion of each member's mandatory dues allocable to the contested legislative positions.

Remarkably, the Petitioner in the instant action did not register an objection to any of the legislative actions formally noted in his own member publication. Presumably, such action by petitioner would have resolved the bulk of his concerns expressed in this action.

As addressed in the Bar's Motion to Dismiss Petition, separately filed herein, Mr. Schwarz is "49 signatures short of that which is required by Bylaw 2-10.1(g)" to seek this Court's review. And, assuming those "similarly situated" to Petitioner are reflected in the 19 member objections filed to the series of published legislative positions *and* in the one communication referenced in the separate proceeding to review the codified objection procedure, itself duly noticed, there appears to be only some 20 members of this organization concerned enough about aspects of their Bar's legislative program to take the minimal steps necessary—and condoned by controlling United States Supreme Court case law—to seek relief readily available from this organization.

The Bar has never questioned the passion or sincerity of Petitioner's beliefs in this action. Indeed, he has acknowledged that this organization's governing Board has granted him personal audience on two occasions for expression of his concerns.

However, Petitioner's inaccurate understanding of the Board of Governors most recent legislative action, coupled with his apparent ignorance of news accounts and official notices in his Bar publications—as reflected throughout his Petition and addressed in our companion Response—nevertheless cast further doubt

on the merits of his proposal when viewed against the backdrop of a constitutionally sound procedure for resolution of individual member dissent from the Bar's legislative activities.

E. If Further Remedial Action on The Florida Bar's Legislative Procedures is Deemed Necessary by This Court, the Bar Should be Provided the Opportunity to Initially Study and Propose Such Measures.

Throughout this discussion, the Bar has detailed its open, responsible and democratic processes for resolution of the various issues generated by this organization's dynamic legislative program.

Approval from this Court for such activities continues. The Supreme Court of Florida has within its inherent power—and by Bar Rule 1-11.4, the specific authority—to intercede in the administration of this organization's internal procedures at any time. This tribunal has not done so. We interpret such action as some support of The Florida Bar's management acumen and the validity of its activities in the legislative arena.

Consistent with that interpretation, the Bar respectfully urges that if any aspects of its legislative procedures are needy of revisitation or further study, this organization should be provided the first opportunity to conduct that activity without the creation of any independent commission as urged by Petitioner.

This Court's July 7 order seeking the Bar's response to correspondence from Walter M. Meginniss regarding *The Florida Bar; Re: Amendment to Bylaw 2-9.3 (Legislative policies)* is viewed as an additional indication of reliance on this organization's ability to independently but responsibly craft a solution to its own problems. Our response in that action to review the Bar's codified procedure for legislative objections should provide additional authority to suggest the minimal merit, if not mootness, of Petitioner's claims in the instant action.

Even assuming the value of some independent study group, the Bar must observe that Petitioner's proposal, on its face, reflects shortcomings in its omission of four additional in-state law schools of comparable prestige and resources to complement the two institutions referenced. Similarly, there are even more state-funded and private Florida colleges and universities with government and political science scholars worthy of consideration for service on such a panel.

CONCLUSION

Petitioner's argument throughout this action is that the Supreme Court of Florida has failed to define or limit the scope of The Florida Bar's legislative program. In fact, such activities are well clarified and governed by a dynamic process that fully meets constitutional requirements and meaningfully addresses potential member challenges. Furthermore, Petitioner's concerns have been thoroughly reviewed by the governing Board of this organization and found to be of questionable merit or necessity. Petitioner's position is, at most, indicative of the views of an extremely small minority of bar members—all of whom can seek relief via existing organizational procedures. However, if further study of bar procedure were considered worthwhile by this Court, this organization should be allowed the opportunity to initially study such matters without the creation of a separate study group. In fact, such analysis appears to be ongoing in other matters before this Court which may be dispositive or moot Petitioner's claims.

Respectfully submitted,

Ray Ferrero, Jr.
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Paul F. Hill
General Counsel
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Tallahassee, Florida 32301-8226

/s/ John F. Harkness, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Thomas E. Schwarz, 4561 Northwest 79th Avenue, Lauderhill, Florida 33321, by mail this 27th day of July, 1987.

/s/ John F. Harkness, Jr.

Legislative policies amendment creates procedure for objecting to use of dues

The Florida Bar, pursuant to Bylaw 2-10.1(c), hereby gives notice of amendment to Bylaw 2-9.3, Legislative policies. The amendments create a procedure whereby members of The Florida Bar may object to use of Bar dues for specific legislative positions and a means to determine if a pro rata refund of dues should be made.

The entire text of Bylaw 2-9.3, as amended, is published below.

2-9.3 Legislative policies

(a) The Board of Governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the Board of Governors or two-thirds of the Executive Committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the Board meeting at which the positions were adopted.

(c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the

objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the Board of Governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(d) Composition of arbitration panel. Objections to positions of The Florida Bar may be referred by the Board of Governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as practicable following the decision by the Board of Governors that a matter shall be referred to arbitration.

The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member and those two members shall choose a third member of the panel who shall serve as chairman. In the event the two members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the Board of Governors that the matter shall be referred to arbitration, the Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel, as soon as the panel is properly constituted. The arbitration panel shall thereafter confer and decide whether the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. The decision of the arbitration panel shall be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel may order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the Board of Governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, The Florida Bar shall provide such refund within thirty (30) days of the date of the arbitration panel's report, together with interest calculated at the legal rate of interest as of the date the written objection was received by The Florida Bar.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

Case No. 70,702

THE FLORIDA BAR

RE: THOMAS R. SCHWARZ

Filed: August 19, 1987

REPLY TO ARGUMENT OF THE FLORIDA BAR IN SUPPORT OF ITS RETURN

The petitioner, THOMAS R. SCHWARZ, replies hereby to the return heretofore filed by The Florida Bar in this proceeding.

INTRODUCTION

The action before this Court is sui generis. Petitioner has taken the view that the order to show cause issued by the Court incorporates the petition. The issues are therefore made by the petition and the return. Under this view no reply is required in order to complete the pleadings.

In addition to its return the respondent has filed a motion to dismiss the petition. This motion is grounded on the view that having been deprived of his rights under Rule 2-10.2 through mistake of the Bar, the petitioner is relegated to proceedings under Rule 1-12.1. It is maintained that the Court improvidently entertained the petition addressed to its Rule 1-11.4 powers for correction of the Bar mistake. This subject is covered separately in an accompanying memorandum.

THE ISSUES AS TO AMENDMENT TO RULE 2-3.2(c)(4) DEFINING THE SUBJECT MATTER SCOPE OF POLITICAL ACTIVITY DELEGATED TO THE BAR

Issue I: Does the Supreme Court under Articles I, II, and V of the Florida Constitution have the right

to engage in political activity in furtherance of or opposition to substantive laws proposed without subject limitation?

Issue II: Has the Supreme Court defined the scope of its delegation of political power to the Bar with sufficient precision to confine its exercise to Article V powers in which in has a constitutionally declared compelling interest?

Issue III: May law licensees be forced to associate institutionally with an Integrated Bar engaged in political activity beyond that in which the Supreme Court has a specifically defined compelling State interest?

ARGUMENT

A. Issue I Argument

The limitation of power of the Supreme Court is the sine qua non in any study of the legitimacy of its ability to delegate. The source material is the Constitution of the State of Florida, specifically Articles V, I, and II. Without an understanding of the area of the Court's special constitutional competence, no legally rational evaluation of the propriety of its delegation of power can be made.

This matter is raised in the petition, but it is neither discussed in the Bar return nor the argument in support thereof.

Article V - The Judicial Department - establishes a system of courts for situational application of law, a system for their management, the power of regulation of practitioners, and procedures and a variety of other procedural and administrative powers. Nowhere does it provide to the Judicial Department a power to establish law. The power to establish law is the constitutional function of the Legislative Department. The exercise of the power to establish law is a political function residing exclusively in the Legislative Department.

In furtherance of the overall concept of limited governmental function, each department is prohibited by Article II from exercising a function of the other. In the end, residual political power is reserved for exercise by the people - not any governmental department.

Any power of the Judicial Department to engage in the process of establishment of law - other than by its situational application and interpretation - is not delegated but implied. Any implied power must be directly related to and inferable from a delegated power. The validity of any such implication of power must be strictly construed. In the area of establishment of law, a political function of the legislature, implication of power in the Judicial Department is not only constrained by the general rule with respect to implied power but specifically by Articles I and II of the Florida Constitution.

The first portion of the proposed amendment to Rule 2-3.2(c)(4) provides for a definition of scope of political activity consistent with any power legitimately implied from Article V:

> "(a) provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration, funding, creation or supervision of the system of Courts or the licensing, admission to practice or desciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public relations activity in association with any program developed under this section nor contributed to any Political Action Committee."

B. Issue II Argument

The argument of the respondent in support of its return takes the position that this Court has sufficiently defined its power delegated to the Bar to engage in political activity in the establishment of law.

This claim is made without reference to the pertinent Articles of the Florida Constitution, without discussion of the implication of power, and without reference to Rule 2-3.2(c)(4). The latter Rule is the specific delegation to the Bar to intervene politically in the establishment of laws. On its face it is unlimited as to subject matter. It is this section to which the amendment proposing subject matter definition is addressed.

The contention of the Bar is that Rule 1-2 (the former preamble) and the decision of this Court in *The Florida Bar,* 439 So.2d 231, 215 (Fla. 1983) - hereinafter "Westman" - provide the necessary definition.

The refutation of this contention is best illustrated by the return itself and a comparison of the subject matter of political activity admitted in the return with that approved by this Court in *Westman.*

Paragraphs 13, 14, 16, and 17 of the return in relation to the Bar's admitted political activity states: "The Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida." The possible predicates for these repeated statements can only be: (1) The Bar has private sources of power other than those delegated to it as the Court's official arm; (2) The laws of agency do not apply to the Bar; (3) The Bar is acting outide of its authorized scope; (4) By virtue of the vagueness of the description of its delegated powers the Bar is unable to determine its scope of authority; or finally (5) As suggested in paragraphs 10(c)(I) and 10(c)(III) of the return, the use of funds other than general funds provides a "cut out" and deniability."

A listing of the political activity specifically approved in *Westman* formed the predicate for the Court's decision not to stop all political activity by the Bar. The political activity currently engaged in by the Bar, as compared with that in *Westman,* refutes the Bar's contention that sufficient definition of its powers already exists:

Westman Case	**May 1987 Board of Governors (Return, Paragraph 10)**
1) Two separate refinements of Article V.	1) Legislation regarding lien priority on vessels polluting by oil spills.
2) Establishment of District Courts of Appeal.	2) Legislation regarding negligence standards for acts in emergency.
3) Merit retention of appellate judges.	3) Legislation regarding service of process on limited partnerships.
4) Creation of the Judicial Qualification Commission.	4) Legislation regarding insurance requirements for hospitals and physicians with respect to tort actions.
5) Approval of the interest on (lawyer) trust account program.	
6) Support of Florida Legal Services, Inc.	
7) General constitutional revision.	

The approved activity in *Westman* all relates to matters particularly associated with Article V powers: The establishment, management, and supervision of courts and the regulation of practice.

On the other hand, the political activity undertaken by the Board of Governors in May 1987 relates to purely general substantive subjects. To argue that *Westman* supports the unlimited subject matter political activity contended for and acted upon by the Bar is sheer sophistry - subtly fallacious reasoning or disputation. (Funk & Wagnall's Dictionary). The activities undertaken by the Bar clearly have no relation to Article V powers of the Court nor to the activities approved in *Westman*. The type of reasoning used by the Bar to attempt to equate *Westman* to a definition of power cries out the need for the Rule amendment.[1]

The proposed amendment definition clearly and specifically includes activities approved in *Westman*.

C. Issue III Argument

In the argument in support of its claim of the constitutionality of forcing law licensees to associate with an Integrated Bar having political power in subjects unrelated to Supreme Court Article V compelling State interest, the Bar refers to *Gibson v. The Florida Bar,* 798 F.2d 1564 (C.C.A. 11, 1986), and to a series of United States Supreme Court cases involving the political powers of labor unions.

Neither *Gibson* nor the series of labor cases relied on by the Bar decide the scope of political activity constitutionally permissible to an Integrated Bar. The *Gibson* opinion provided:

> "It should be stressed that this opinion addresses only the use of compelled fees by the Bar."

The *Gibson* petition was predicated upon the constitutionality of the use of compelled dues, not the impermissible scope of

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[1] Listings of 1985 and 1986 legislative priorities published in the official publication setting out Bar political aims show beyond peradventure that its May 1987 subject matter is typical.

that activity. The opinion "stresses" that fact. The proceeding points up the unsatisfactory character of ad hoc Federal court resolution of problems in the administration of Integrated Bars.

There are two dicta dealing with permissible scope. Footnote 4 of *Gibson* lists the type of matters thought by the Eleventh Circuit to be appropriate Bar activity:

> "Acceptable areas for Bar lobbying would include the following topics: (1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; (5) law school and Bar admission standards."

The subject matter listed comports with the approved political activity in *Westman* and is consistent with the Article V powers of this Court and the definition of scope set out in the proposed amendment to Rule 2-3.2(c)(4).

The use by the Bar of the dicta quoted on page 10 of argument in support of unlimited political power, is seriously misleading. It masks the dicta character of the statements, i.e., scope of activity was not before the court. It also inferentially asks this Court to adopt an analogy of power between the Bar and a trade union - an analogy rejected by the Court in its opinion and order creating the Bar itself:

> "(The Bar) is not a compulsory union but a necessary *one to secure the composite judgment of the bar on questions involving its duty to the profession and the public.* (E.S.)
>
> *Petition of Florida State Bar Association,* 40 So.2d 902, 908 (Fla. 1949)

The distinction as it relates to scope and source of power is crucial.

The Federal laws pertaining to labor union powers beginning with Section 7 of the National Recovery Act, through the

Wagner Act, the Taft-Hartley Act, and myriad others, are enacted under the General Welfare and Interstate Commerce clauses of the Federal Constitution. They declare that the Federal legislative interest in general welfare and management of interstate commerce is fostered by union activity in all fields of human activity. Union political activity under these broad areas is provided for and regulated and relates to the promotion of the well being of laborers in the entire spectrum of life. Even within this broad mandate and specific authorization, to comport with First Amendement rights and due process *in respect to property* (funding), compulsory dues cannot be used for purposes unrelated to collective bargaining. Expenses of collective bargaining can be used regardless of dissent under the "no free rider" concept.

An Integrated Bar is not created under the General Welfare or Interstate Commerce provisions. It is created as an aid to the Court in fulfillment of its Article V powers. Its engagement in politics, selecting legislative alternatives to solutions of broad social, commercial, and human problems, is inconsistent with separation of powers, an independent judicial department, and non-partisan selection, appointment, and retention of the judiciary. It is inconsonant with the concept that the Bar is not a union with power to promote the welfare of its members.

One further dictum in *Gibson* is instructive. The phrase "to promote administration of justice and to advance the science of jurisprudence" is characterized as "amorphous." The correctness of this characterization is confirmed by the Bar in paragraphs 13, 14, 16, and 17 of its return and its selection of subjects for political activity. The term 'amorphous' is defined as without form or shape. Your petitioner will not attempt to give meaning to the phrase "advance the science of jurisprudence." To the extent that the Bar has been a vehicle for accomplishment of that purpose, The Florida Bar Journal is the proper mechanism.

It is clear that the subjects discussed at the May 1987 Board of Governors meeting were not related to any such conception.

Neither were the arguments characterized by petitioner as "ad hominem" or "fatuous" possible contributions to jurisprudence.

Insofar as "administration of justice" has any definable meaning, it is the application of law - not its establishment. The phrase combination of "administration of justice" is so defined in the standard dictionaries. The phrase is not a term of legal art and, hence, is imprecise.

D. Pleading Issue Formed As To Second Portion Of Proposed Amendment to Rule 2-3.2(c)(4)

Issue: Should the general and ordinary execution of the Court's delegated political functions be conducted by formal, written, structured means as other Court business, or should it be involved with general public television ad and public relations campaigns and the personal, private lobbying of governmental officials of other departments?

This portion of the proposed amendment to Rule 2-3.2(c)(4) opts for the execution of the authorized political activity by the Bar in a formal manner. It requires open and direct communication with appropriate government officials. Courts act directly, openly and through written word. The fanning or inflaming of public opinion in support of or against a suggested political solution within the ambit of the Court's power is hardly consistent with the concepts of dignity or fairness of the court system. The regularization of political conduct avoids the problems occasioned by loose cannons or the actions of zealots.

In special circumstances the Bar could apply to this Court for approval of unique programs under its inherent power memorialized in Rule 1-11.4.

E. Proposed Amendment to Rule 10-2 For Change In Method Of Voting On Rule Amendments At The Annual Membership Meeting.

Issue: Is the current Rule qualifying only those present and voting at the annual meeting unfairly restrictive?

This proposed amendment would provide that suggested or proposed Rule changes for submission at an annual meeting be voted upon by mail ballot of all members as well as those present and attending the meeting.

Under the present Rule the Bar News reported that the recent meeting was attended by seven hundred members. Accordingly under the present Rule, there were seven hundred qualified voters. Under the proposed amendment there would have been more than forty thousand qualified voters. The present procedures under Rule 10-2 deny the vote to those whose condition of employment, financial status, or inability to control their schedule, inhibits the ability to attend the annual meeting in person. Included in this group are many members employed by governmental agencies, employed in direct service to the poor, or having young families with schedules geared to accommodate family needs. Under the proposed amendment on the subject of Rule changes to be considered by the general membership, there would be forty thousand qualified voters - not merely seven hundred as under the existing Rule. It seems obvious that with more than fifty times the number of qualified voters, broader participation would result.

The Bar return does not argue the desirability of broader participation, but simply denies that the proposed amendments "necessarily relate to any *democratization* of the Bar's rule amendment process." One cannot argue such a denial but only wonder if we are on the same planet.

CONCLUSION

Any serious reading of the proposed amendment to Rule 2-3.2(c)(4) shows that it has nothing to do with the funding of political activities. Its clear, primary purpose is to prevent any Bar political activity beyond subject matters appropriate to the proper powers of this Court through the agency of the Bar. Its secondary purpose is to prevent the use of private persons and mass media techniques in the exercise of governmental function (propaganda), and to provide accountability and control.

The Bar is not a union designed to support the well being of its members or the particular substantive law desires of its members or any of them. Since at least 1983 virtually none of the Bar's legislative activity has been directed to "*administration* of justice." It has been addressed to substantive law. The arguments admittedly made in support of its substantive law positions are, in the main, similar to those admitted in paragraph 10(d) of its return. While the return objects to the characterization of those arguments as "ad hominem" or "fatuous," they can hardly be considered an effort to advance the science of jurisprudence.

The Bar's return claims that under present conditions it does not know whether or not it is acting as agent of this Court. It is claimed that, by silence, this Court has approved its activities. To the extent that its activity is beyond the power of the Court or the Court's delegation of power to the Bar, it is an ultra vires infringement on licensees' rights.

The proposed amendment to Rule 2-3.2(c)(4) would end these doubts and provide guidelines consistent with constitutional requirements. The need for an amendment of this type grows not only out of the rights of licensees but, even more importantly, out of the need to establish clear guidelines in the separation of powers of the various departments of government. It is this separation that makes the Judicial Department independent, fair, and impartial. The intrusion by the Judicial Department into

general substantive law matters on the basis of political considerations destroys the essential characteristics of that Department. Such intrusion into political, substantive matters - appropriate only to private or special-interest bar associations - is not constitutionally permissible and is inconsistent with the concept of a separate, fair, and impartial Judicial Department when carried out by this Court's official arm.

Petitioner believes that the amendments proposed represent a proper solution. The matter of intergovernmental relationships is, however, an intricate, delicate, and complex one. Contrary to the contentions of the Bar, procedural refinement, technique, and notices cannot supply the subject matter jurisdiction. In argument at the top of page 9 of the Bar's return there are listed a number of Bar cases to illustrate the current foment in Bar management on this subject. They are no precedents; each jurisdiction is unique. The California Bar is organized under the corporation powers of its legislature and is provided with certain political powers. In the case cited, 226 Cal. Rptr. 448, the court nonetheless restrained outrageous (ad hominem) statements of the Bar. The New Hampshire case, 509 A.2d 753 (N.H. 1986), restricted political activity to appropriate (*Westman*-type) subjects. Some are private Bar activities. Each is unique.

The need for guidance action is urgent. Annual expenditures for these uncontrolled actions run at the rate of $500,000.00 to $700,000.00 per annum, which may be considered as a measure of the degree of Bar involvement.

Within the admitted limits of petitioner's erudition, the proposed amendments represent a correct, balanced, proper, and effective resolution of the problems discussed. In light of the petitioner's conceded limitations and the complex intergovernmental relations involved, the Court may wish to undertake further examination of the amendments and their underlying predicates. This possibility may suggest the desirability of a time-limited study commission made up of independent and

erudite persons. In that case, hopefully, the Court might temporarily restrict its official arm to political activity related to "the *administration* of justice (law)" and commit "the advancement of the science of jurisprudence" to The Florida Bar Journal.

I HEREBY CERTIFY that a copy of the foregoing was served by mail on August 10, 1987 upon: John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida 32301; Ray Ferrero, Jr., Esq., P.O. Box 14604, Fort Lauderdale, Florida 33302; Rutledge R. Liles, Esq., 901 Blackstone Building, Jacksonville, Florida 32202; John A. Boggs, Director of Lawyer Regulation, The Florida Bar, Tallahassee, Florida 32301.

THOMAS R. SCHWARZ
4561 N.W. 79th Avenue
Lauderhill, Florida 33321
Ph: 742-6979
(Fla. Bar #129383)

/s/ Thomas R. Schwarz
Thomas R. Schwarz

APPENDIX E

SUPREME COURT OF FLORIDA

No. 70,702

THE FLORIDA BAR

RE: THOMAS R. SCHWARZ

(June 2, 1988)

McDONALD, C.J.

In this petition Thomas R. Schwarz, a member of The Florida Bar, seeks the appointment of an ad hoc commission to study and report "on the legality, propriety, scope, and procedures, if any, through which this Court may exercise political power considering Articles I, II, and V of the Florida Constitution, the Code of Judicial Conduct, and such other materials and ethical principles as it may deem appropriate." The request comes not because of direct action taken by members of this Court, but because of the legislative and lobbying activities of The Florida Bar.

Prior to filing this petition, Schwarz proposed to the bar an amendment to rule 2-3.2(c)(4), Rules Regulating The Florida Bar, reading as follows:

> a. provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration, funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members' dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public

> relations activity in association with any program developed under this section nor contributed to any Political Action Committee.

When he filed the instant petition, Schwarz' proposal had neither been formally accepted nor rejected by the board of governors. Schwarz avers that this Court has failed to place limits on or define the scope of "its delegation of political activity to its official arm."

In *Re Amendment to Integration Rule of The Florida Bar,* 439 So.2d 213, 213 (Fla. 1983), we rejected the following proposal: "The Board of Governors shall not engage in any political activity on behalf of The Florida Bar nor expend money or employ personnel for such purpose." In doing so, we restated the purpose of the bar as being "[t]o inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." *Id.* (quoting Fla. Bar Integr. Rule, Preamble).[1] We stated: "Clearly the improvement of the administration of justice and the advancement of the science of jurisprudence is a compelling state interest." *Id.* Later in the opinion we cited acts of The Florida Bar that we felt were within the purpose of Florida bar.[2] *Id.* at 214. Nevertheless, the definition of what activites are proper and what are improper continues to be a matter of dispute. We have not said what clearly should be excluded; perhaps we should.

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[1] The same language is now included in rule 1-2, Rules Regulating the Florida Bar.

[2] In approving the board of governors' engaging in political activites we relied on the existence of standing board policy 900, which provides that a position may not be taken on proposed legislation unless the board determines that the legislation is related to the pruposes of the bar. The board's decision may not be determinative, however, because the proposed action may not be within the range of permissible activities. The final determination of what should or should not be done does not necessarily rest with the board of governors.

To practice law in the courts of Florida we require that all lawyers be members of The Florida Bar. Exception can be made for a particular case, but, for the day-by-day practice, there is no exception — membership in The Florida Bar is compelled.[3] This compelled membership should limit the activities of The Florida Bar to the stated purposes. Some of the most sensitive differences of opinion among members of the bar originate from a disagreement about whether or not courses of action taken by the bar's governing body fall within or without those stated purposes. Florida is not unique in this dialogue.[4]

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[3] Two courts have recently found compulsory bar membership unconstitutional. Schneider v. Colegio de Abogados, Nos. CIV. 82-1459, CIV. 82-1513, CIV. 82-1514, CIV. 82-1532 (D. Puerto Rico Mar. 3, 1988) (failure to protect dissenters' rights makes compelled membership in bar association unconstitutional); Levine v. Supreme Court, 679 F.Supp. 1478 (W.D. Wis. 1988) (mandatory bar membership is a constitutionally impermissible burden on an individual's rights of association and speech).

[4] Several courts in addition to those listed in note 3, *supra,* have considered the impact of compulsory bar associations' activities on their members' rights. Arrow v. Dow, 544 F.Supp. 458 (D.N.M. 1982) (bar may use dues to support only functions and duties which serve important governmental functions; lobbying at issue did not do so); Virgin Islands Bar Ass'n v. Government of Virgin Islands, 648 F.Supp. 170 (D.V.I. 1986) (low-profile, nonpartisan bar association's limited legislative activity does not infringe on dissenters' rights); Bridegroom v. State Bar, 27 Ariz. App. 47, 550 P.2d 1089 (1976) (approved bar association's use of dues to advocate passage of a state constitutional amendment); Keller v. State Bar, 181 Cal. App. 3d 471, *printed at* 190 Cal. App. 3d 1196, 226 Cal. Rptr. 448 (state bar may not use compulsory dues to support ideological or political causes not germane to its statutory purposes), *review granted,* ____ Cal.3d ____, 723 P.2d 1, 229 Cal. Rptr. 144 (1986); Petition to Amend Rule 1 of Rules Governing the Bar, 431 A.2d 521 (D.C. 1981) (denied amendment limiting use of compulsory dues); In re Florida Bar Board of Governors' Action, 217 So.2d 323 (Fla. 1969) (denied petition for review, but did not adopt Justice Hopping's view that bar had virtually unlimited power to expend moneys for lobbying); Falk v. State Bar, 418 Mich. 270, 342 N.W.2d 504 (1983) (bar's use of mandatory dues in connection with political activities is a substantial governmental interest which outweighs infringement of dissenter's negative first

The Supreme Court of New Hampshire in *In re Chapman*, 128 N.H. 24, 509 A.2d 753 (1986), recently wrestled with this problem. In that case, Chapman sought to have the court enjoin the New Hampshire Bar Association (an integrated bar similar to Florida's) from actively opposing so-called "tort reform" legislation. The court noted that the issue was whether or not the board's decision to oppose tort reform was inconsistent with the powers and authorities conferred upon the bar association. The New Hampshire Court commented that it "is obligated to interpret the limits on bar activities so as to preclude the first amendment infringement that would result if the Association were to take positions on issues outside the scope of those responsibilities that justify compelling lawyers to belong to it." *Id.* at 31, 509 A.2d at 758. It then stated:

> In view of the Association's special status as a unified bar, we conclude that concerns for first amendment liberties require a narrower view of its permitted legislative activities than the Association has taken. Hence, the Association should limit its activities before the General Court to those matters which are related directly to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession. The Board's opposition to tort revisions as a whole is not within the mandate of the Association's constitution. . . .

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amendment interests); Reynolds v. State Bar, 660 P.2d 581 (Mont. 1983) (state bar may not use compulsory dues for lobbying unless it makes refunds to dissenters); Petition of Chapman, 128 N.H. 24, 509 A.2d 753 (1986) (bar must carefully tailor its position on legislative activities to limited issues within its constitutional mandate in order to protect its members' individual rights); Petition to Review State Bar Bylaw Amendments, 139 Wis. 2d 686, 407 N.W.2d 923 (1987) (approves procedure by which member may challenge dues' use for legislative activities). *See also* Falk v. State Bar, 411 Mich. 63, 305 N.W.2d 201 (1981); Sorenson, *The Integrated Bar and the Freedom of Nonassociation—Continuing Seige*, 63 Neb. L. Rev. 30 (1983); Annot., 40 A.L.R. 4th 672 (1985).

> We believe that circumspection is the watchword to be observed by the Board. Where it can reasonably be argued that an issue is outside the scope of its authority, the Board should take no position on the matter. Where substantial unanimity does not exist or is not known to exist within the bar as a whole, particularly with regard to issues affecting members' economic self-interest, the Board should exercise caution. Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate.

Id. at 32, 509 A.2d at 759.

We make no decision today on whether any existing specific activity of The Florida Bar is improper. We suggest, however, that the board of governors review its policies and current positions concerning political activity in light of the decisions of other jurisdictions.

This area needs further study. We decline to appoint a special committee as requested by Schwarz, but refer this matter to the Judicial Council for its comments and recommendations. We ask for a report from that body prior to the end of this calendar year. Schwarz' petition is granted to the extent set out in this opinion; any requests not discussed herein are denied.

It is so ordered.

OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding — The Florida Bar

Thomas R. Schwarz, in proper person, Lauderhill, Florida, for Petitioner

John F. Harkness, Jr., Executive Director and Paul F. Hill, General Counsel, Tallahassee, Florida; Ray Ferrero, Jr., President, Ft. Lauderdale, Florida; and Rutledge R. Liles, President-elect, Jacksonville, Florida,

for The Florida Bar, Respondent

APPENDIX F

SUPREME COURT OF FLORIDA

No. 70,702

THE FLORIDA BAR

RE: THOMAS R. SCHWARZ

[October 26, 1989]

GRIMES, J.

This is a continuation of *The Florida Bar re Schwarz,* 526 So.2d 56 (Fla. 1988), on the issue of what lobbying activities of The Florida Bar are permissible. As a creation of this Court, The Florida Bar is under our supervision and subject to our regulation.

In the original *Schwarz* opinion, we referred this matter to the Judicial Council for its comments and recommendations. The Council conducted public hearings on the subject. In its report, the Council first concluded that The Florida Bar could constitutionally engage in activities directed toward the administration of justice and the advancement of the science of jurisprudence. The report then stated:

> The integrated bar offers specialized skills, training, education, and experience with which to serve in an advisory function to the various branches of state government. The Council submits that the advice of the Bar is important to the legislature's deliberations within areas pertaining to the administration of justice. These issues may frequently be technical and complex and have effects not otherwise contemplated by the legislation. It appears that the Bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the courts and the administration of justice and ad-

> vise the legislative and executive branches of government of its collective wisdom with respect to these matters. To prohibit such communication would work a grave disservice to the people of this state and would infringe upon the free speech of the great majority of the state's attorneys. The Florida Bar has a reputation of pursuing improvements in the administration of justice and science of jurisprudence. The relative weight to be accorded these compelling interests appears to be of such great importance as to fully justify the relatively insignificant intrusion occasionally experienced by dissenting members of the Bar.

Judicial Council of Florida, Special Report to the Florida Supreme Court on Legislative Activities of The Florida Bar 6-7 (Dec. 1988) (on file with the Florida Supreme Court) [hereinafter Special Report on Legislative Activities]. In seeking to define the administration of justice and the advancement of the science of jurisprudence, the Council recommended that the following subject areas be recognized as clearly justifying legislative activities by the Bar:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and
>
> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

Special Report on Legislative Activities, *supra,* at 9. The Council also recommended that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the above specifically identified areas:"

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matterr affects the rights of those likely to come into contact with the judicial system.

Id. at 9-10.

Thereafter, we entertained comments in response to the report and heard oral argument on the subject. Upon consideration, we have concluded that the Council's recommendations are well taken.

The Florida Bar was integrated by this Court in *Petition of Florida State Bar Association,* 40 So.2d 902 (Fla. 1949). Justice Terrell, writing for the majority, defined the integrated bar "as the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which each member is obliged to bear his portion of the responsibility." *Id.* at 904. He further stated that integration "provides a fair and equitable method by which every lawyer may participate in and help bear the burden of carrying on the activities of the bar instead of resting that duty on a voluntary association composed of a minority membership." *Id.*

As noted by Justice Terrell:

> Bar integration grew from a felt necessity for an organization that could speak for the profession in esse. It is not a compulsory union but a necessary one to secure the *composite judgment of the bar* on questions involving its duty to the profession and the public. . . .
>
> . . . The assault on our institutions which the bar is expected to take the leading role in challenging also requires the full manpower of the bar. We do not think bar integration would be worth the candle as a specific for unethical

> conduct, but as a means of giving the bar a new and enlarged concept of its place in our social and economic pattern.
> . . .

Id. at 908 (emphasis added).

In 1969 this Court denied a petition seeking to prevent the Board of Governors of The Florida Bar from lobbying for the adoption of the proposed revision of the Florida Constitution. *In re Florida Bar Board of Governors Action,* 217 So.2d 323 (Fla. 1969). In a concurring opinion, Justice Hopping succinctly observed:

> Since the inception of The Florida Bar, the Board of Governors has faced up to its professional responsibility of acting in the spirit of public service and has prepared and advocated adoption by the State Legislature of numerous enactments, including the Mechanics' Lien Law, the Uniform Commercial Code, the Public Defenders' Act, the law providing for filing of administrative rules in the Office of the Secretary of State, and major reforms in the substantive law of this State. It has sponsored adoption by the Legislature and the electorate of Florida, several constitutional amendments including the amendment creating the District Courts of Appeal and the Judicial Qualifications Commission. It has consistently advocated in the Legislature various improvements in the judicial system. Some of these matters were directly related to the administration of justice, some were toally unrelated to the administration of justice, and others were "political" in nature, using the word "political" in its broad sense as pertaining to the organization or administration of government.

Id. at 324 (Hopping, J., concurring).

In 1983 this Court denied a petition seeking to amend the integration rules to prevent the Board of Governors from engaging in any political activity on behalf of The Florida Bar. *In re*

Amendment to Integration Rule of The Florida Bar, 439 So.2d 213 (Fla. 1983). In reaching our conclusion, we pointed out that:

> [P]etitioners are made cognizant of the fact that any attorney "is still free to voice his own views on any subject in any manner he wishes. He can do this even though such views be diametrically opposed to the position taken by the unified bar of this state." *In re Unification of the New Hampshire Bar,* 109 N.H. 260, 266, 248 A.2d 709, 713 (1968). This may take the form of working within The Bar itself or its committees or it may be through external means. But he is never forced to adhere to or proclaim any political view or engage in any personally-repugnant political activity.

Id. at 215.

The California Supreme Court recently passed on the lobbying authority of its state bar which levies membership dues without the possibility of partial rebate. Reasoning that the words "advancement of the science of jurisprudence" should be read broadly in the context of lobbying activities, the court held that the bar was authorized to comment generally upon proposed legislation. *Keller v. The State Bar of California,* 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989), *cert. granted,* ____ S.Ct. ____ (Oct. 2, 1989). While that decision was broader than the one we reach today, we find most pertinent the following observation of the California court:

> Laws are the business of lawyers. The drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to

> significant improvements in the legislative proposal. "The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems."

Id. at ____, 767 P.2d at 1030-31, 255 Cal. Rptr. at 552 (citation and footnote omitted).

Several portions of the Rules Regulating The Florida Bar also support our conclusion. Thus, rule 1-2 states:

> The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

Rule 2-3.2 of the Rules Regulating The Florida Bar further provides:

> Subject to the continued direction and supervision by the Supreme Court of Florida, the board of governors may, by amendment to this chapter, take all necessary action to:
>
> . . . .
>
> (c) Establish, maintain and supervise:
>
> . . . .
>
> (4) A program for providing information and advice to the courts and other branches of government concerning current law and proposed or contemplated changes in the law.

Most significantly, rule 2-9.3 of the Rules Regulating The Florida Bar specifies in part:

> RULE 2-9.3 LEGISLATIVE POLICIES
>
> (a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

This rule insures that The Florida Bar will take a legislative position only after first independently focusing on the question of whether the subject matter is one in which the organized bar should become actively involved. In reaching this determination, the Board of Governors should refer to the criteria set forth in this opinion. However we also suggest that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar. In any event, we also wish to make clear that any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court.

In *The Florida Bar re Amendment to Rule 2-9.3,* 526 So.2d 688 (Fla. 1988), we approved an amendment to the Rules Regulating The Florida Bar to provide the mechanism for a lawyer who objects to legislative positions taken by The Florida Bar to obtain a partial rebate of bar dues. As part of the process, The Florida Bar is required to publish notice of adoption of legislative positions in The Florida Bar News in the issue immediately following the board meeting at which the positions

are adopted. In this manner, lawyers are alerted to the legislative positions being taken by The Florida Bar and by registering their objections they may be relieved of paying for their share of the expense attributable to the advocacy of the legislative positions with which they disagree. Consistent with the response filed by The Florida Bar in this action, we ask the Board of Governors to submit proposed amendments to this rule which will make clear that the Bar carries the burden of proof in such proceedings and providing that the names of objecting bar members, at their option, be kept private.

We approve the recommendations of the Judicial Council and adopt them as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT and KOGAN, JJ., Concur
McDONALD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., dissenting.

I would limit the lobbying activities of The Florida Bar to the five subject areas which the Judicial Council recognized as "clearly justifying legislative activities" by the bar.

While there is some question on portions of the five subjects that the council finds clearly justified, the overwhelming view is that it is appropriate for The Florida Bar to participate in legislative activities in these designated areas. Few disagree that these areas fall within the stated purpose of the mandated membership of The Florida Bar. On the other hand, though supported by the majority of the board of governors of The Florida Bar, the council's suggestion that the bar may lobby on

issues of great public interest and in matters that lawyers are especially suited to and that affect the rights of those likely to come into contact with the judicial system has drawn serious comments and criticism. Some suggest that these criteria are so broad as to be a complete exception to any set of principles. I agree with this.

What distinguishes The Florida Bar from most other organizations is that all lawyers licensed in Florida must belong to it in order to practice their profession. It is this compulsory membership requirement that presents the strongest obstacle to the bar's discretionary lobbying under discussion. Many lawyers, because of their clients' interests or personal predilections, are in disagreement with positions of The Florida Bar on substantive issues and yet are compelled to be a member of an association espousing causes contrary to their beliefs. This presents some first amendment implications. Even without this concern, it appears to me that, except for matters directly attributable to the purpose of The Florida Bar, it is unwise and improper to compel membership and extract dues for causes or political goals antithetical to the beliefs or interests of individual members. In those matters falling outside the direct stated purpose of The Florida Bar it is better to leave lobbying activities to voluntary bar groups such as sections, political action committees, and the like. The lobbying activity of The Florida Bar should be restricted to the five "clearly justified" areas described in the council's report.

The majority does recognize that before taking legislative action it is incumbent on the board of governors first to find that the subject matter is one in which the organized bar should become actively involved. That decision should be determined on whether the proposed action comes within the definition of the stated purposes of The Florida Bar and as restricted by the five clearly defined areas.

I heartily approve of the concept that ready access to this Court be provided for a speedy resolution of issues questioning

the propriety of the bar's lobbying decisions. I trust that the board will act with such circumspection that such challenges will be few and without merit. This will be true if lobbying activities not clearly within the stated purposes of The Florida Bar are left with individual sections, or special groups. No restrictions extend to individual members of the bar; restrictions do and should extend to activities by or in the name of The Florida Bar.

Original Proceeding - The Florida Bar

Thomas R. Schwarz, in proper person, Lauderhill, Florida,
for Petitioner

Joseph W. Little, Gainesville, Florida; Ben L. Bryan, Jr. of Fee, Bryan & Koblegard, P.A., Ft. Pierce, Florida; and Henry P. Trawick, Jr., Sarasota, Florida,
Responding to Report

Rutledge R. Liles, President, Jacksonville, Florida; Stephen N. Zack, President-elect, Miami, Florida; John F. Harkness, Jr., Executive Director, John A. Boggs, Director of Lawyer Regulation, and Paul F. Hill, General Counsel, Tallahassee, Florida; and Barry Richard of Roberts, Baggett, LaFace & Richard, Tallahassee, Florida,
for The Florida Bar, Respondent

APPENDIX G

SUPREME COURT OF FLORIDA

Tuesday, December 19, 1989

Case No. 70,702

The Florida Bar,

Re: Thomas R. Schwarz

The Motion for Rehearing or Clarification filed by Joseph W. Little is hereby denied.

EHRLICH, C.J., OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC

cc: Joseph W. Little, Esquire
Henry P. Trawick, Jr., Esquire
John F. Harkness, Esquire
Barry Richard, Esquire
Ben L. Bryan, Jr., Esquire
Thomas R. Schwarz, Esquire
John T. Berry, Esquire

IN THE SUPREME COURT OF FLORIDA

Case No. 70,702

The Florida Bar

Re: Thomas R. Schwarz

Motion for Rehearing or Clarification

Pursuant to Fla. R. App. Proc. R. 9.330(a), Petitioner, Joseph W. Little, hereby petitions this honorable Court for a rehearing in this case on matters addressed below, or, in the alternative, for the issuance of a revised opinion clarifying the matters addressed below.

The essential thrust of this petition is that the Court's initial opinion has "overlooked or misapprehended" points of law and fact. The essential points of law are Petitioner's assertions that the Court's initial opinion has not supplied a cogent answer to the issue of where the Court itself gets the power to authorize its creation, The Florida Bar, to engage in wide political legislative lobbying activities that go far beyond the powers allocated to the Court by the Florida Constitution, and, furthermore, the initial opinion has relied upon authorities that are not supportive of its decision.

First, the Court has relied upon the initial integration decision, 40 So.2d 902 (Fla. 1949), without acknowledging that it was issued under the markedly different 1885 constitution and that the legislature had at that time broadly allocated powers to the Supreme Court to prescribe rules of practice and procedure. §25.03 Fla. Stat. (1949).

Second, the Court's initial opinion continues to rely upon *In re Unification of the New Hampshire Bar,* 248 A.2d 709 (N.H. 1968) in justification of its decision, but fails to acknowledge that the initial activities of the New Hampshire Bar were subsequently sharply restricted by *Chapman v. Supreme Court of*

New Hampshire, 509 A.2d 753 (N.H. 1986). There, the New Hampshire Supreme Court held:

> In view of the Association's special status as a unified bar, we conclude that concerns for first amendment liberties require a narrower view of its permitted legislative activities than the Association has taken. Hence, the Association should limit its activities before the General Court [i.e. the legislature] to those matters which are related directly to the efficient administration of the judicial system: the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession. The Board's opposition to tort revision as a whole is not within the mandate of the Association's constitution. In essence, to interpret the phrase "administration of justice" in the Association's constitution as broadly as the dissenters [to this decision] do would be to eliminate any limitation on the legislative activities of the association where one was clearly intended.
>
> We believe that circumspection is the watchword to be observed by the Board. Where it can reasonably be argued that an issue is outside the scope of its authority, the Board should take no position on the matter. Where substantial unanimity does not exist or is not known to exist within the bar as a whole, particularly with regard to issues affecting member's economic self-interest, the Board should exercise caution. Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate. Of course, nothing prevents officers and members of the Board from appearing before the associations or as representatives of clients.

509 A.2d at 753. (Material in brackets supplied.)

Finally, this Court's initial opinion relies upon *Keller v. The State Bar of California,* 767 P.2d 1020 (1989) for a broad

reading of the powers of the State Bar. The Court's opinion fails to acknowledge, however, the State Bar of California is a creation of the California *legislature* and not of the California courts. 767 P.2d at 1023, 1024. Thus, the source of power in *Keller* is the broad and general police powers of the legislature and not the restricted regulatory powers of a court. In all due respect to this Court, Petitioner asserts that while the entire judicial power of the State is within its scope, its legislative powers including the legislative powers to empower The Florida Bar are narrowly and specifically defined by the Florida Constitution.

Finally, Petitioner notes that the Court's initial decision states "In any event, we also wish to make clear that any member of the Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court." (p.7) Again in all due respect to the Court, Petitioner asserts that its initial decision provides inadequate guidelines (p.p. 2-3) to permit objectors to understand the basis of any decision that the Court might make. Indeed, any such petition would merely be asking the Court to substitute its judgment for that of the Board as to what is of "great public interest," what things lawyers are "especially suited" to evaluate, and what subjects affect "the rights of those likely to come into contact with the judicial system." In short, the application of this rule imposes not a "rule of law" but a "rule of men," which runs against one of the deepest traditions of constitutional governance.

Finally, the Court's initial opinion proposes some small changes to the rules (p.7) in an apparent effort to avoid First Amendment infringements. In the initial submission in this matter, Petitioner addressed the issue of *sources* of power, and avoided extended discussion of First Amendment limitations. Although the First Amendment issues are now on review in the United States Courts of Appeal for the Eleventh Circuit in *Gibson v. The Florida Bar,* No. 89-3388, and in the United States

Supreme Court in *Keller v. State Bar,* No. 88-1905, Petitioner herein is of the firm opinion that Rule 2-9.3 denies the First Amendment rights of dissenting members when applied with the breadth permitted by the Court's initial decision in this matter. The risk of that infringement could be drastically reduced by deleting the Bar's powers to engage in lobbying activities under the "additional criteria" stated at the top of page 3 of the Court's initial opinion.

Conclusion

In conclusion, Petitioner requests the Court to grant a rehearing on the matters mentioned herein, or failing that, to issue a revised opinion to clarify the points referred to herein, and specifically to delete that portion of the opinion that grants the Board lobbying authority under the additional criteria.

Respectfully submitted,

/s/ Joseph W. Little, Petitioner
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Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing was mailed by the United States postal service to each of the following persons on the 6th day of November 1989:

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(2)

No. 89-1591

IN THE
Supreme Court of the United States
October Term, 1989

THOMAS R. SCHWARZ,
Petitioner,

vs.

THE FLORIDA SUPREME COURT,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

The respondent would restate the question presented as follows:

> Whether an integrated state bar, consistent with the First Amendment, can reserve the right to assert a position on an issue of great public interest that is likely to affect the rights of those who may come into contact with the judicial system if it provides a method for refunding a proportionate amount of the dues used to promote such position to members who disagree with it.

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STATEMENT OF THE CASE

In June 1987, petitioner, Thomas R. Schwarz, a member of the Florida Bar, filed a petition with the Supreme Court of Florida seeking to amend two of the Rules Regulating the Florida Bar (hereafter "Rules"). These proposed amendments are set forth in the appendix to the petition for writ of certiorari. (See P.A. 7-9) Mr. Schwarz sought to amend Chapter 2, Section 2-3.2(c)(4) of the Rules. Chapter 2 is entitled "Bylaws of the Florida Bar" and Section 2-3.2(c)(4) provided:

> 2-3.2 Powers
>
> Subject to the continued direction and supervision by the Supreme Court of Florida, the board of governors may, by amendment to this chapter, take all necessary action to:
>
> * * * *
>
> (c) Establish, maintain and supervise:
>
> * * * *
>
> (4) A program for providing information and advice to the courts and all other branches of government concerning current law and proposed or contemplated changes in the law.
>
> * * * *

Mr. Schwarz's proposed amendment sought to limit such programs to the "organization, administration, funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers" and to prohibit Bar expenditures for "lobbying or public relations activity in association with any program...." (P.A. 7,8) The Board of Governors would be allowed to carry out those programs deemed permissible only by means of "written communications." *Id.*

Petitioner also sought to amend Chapter 2, section 2-10.2 of the Rules. This section permitted amendment of the Rules "by a majority vote of the members in good standing present and voting at any regular or special meeting of the Florida Bar...." Mr. Schwarz proposed an amendment deleting the "present and voting" requirement and substituting therefor a procedure enabling Bar members to cast ballots on proposed amendments by mail. (P.A. 11) The Florida Supreme Court denied this request in its order of June 2, 1988.[1] (P.A. 47, 51)

As relief, Mr. Schwarz's petition asked the Florida Supreme Court to appoint an independent commission to study and report on

> [T]he legality, propriety, scope and procedures, if any, through which this Court may exercise political power considering Articles I, II and V of the Florida Constitution, the Code of Judicial Conduct, and such other materials and ethical principles as it may deem appropriate.
>
> * * * *

(P.A. 6)

In July 1987 the Florida Supreme Court, finding that the petition demonstrated a preliminary basis for relief, issued an order to the Florida Bar to show cause why the petition

---

1 As we read the petition for certiorari, this proposed amendment and the Florida Supreme Court's action with respect thereto is not at issue. No mention of the proposed amendment or ruling thereon is made in petitioner's statement of the case or argument, although it is contained in petitioner's appendix. The Florida Supreme Court clearly declined to take action on the proposal on June 2, 1988, when it referred only the proposed amendment to Rule 2-3.2(c)(4) to the Judicial Council for study and recommendations and denied the remainder of the petition. (P.A. 47-51) To the extent Mr. Schwarz seeks review of the 1988 ruling, his petition is untimely and this Court lacks jurisdiction.

should not be granted. (P.A. 13) The Florida Bar filed a response to the petition, noting that pursuant to the decision of the Court of Appeals for the Eleventh Circuit in *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986), it had proceeded with the proposed adoption of a refund procedure that would allow dissenting lawyers to notify the Bar that they disagreed with a Bar legislative position and then receive that portion of their dues allotted to lobbying, and that the measure was then pending before the court as the *Florida Bar; Re: Amendment to Bylaw 2-9.3.* (P.A. 22-26) (The Florida Supreme Court subsequently adopted the refund amendment to Bylaw 2-9.3 and it is reproduced in petitioner's appendix (P.A. 31-33)).

In his reply to the Bar's response, Mr. Schwarz contended that his petition presented three issues with respect to the amendment of Rule 2-3.2(c)(4), two of which specifically concerned the proper interpretation of the Florida Constitution (P.A. 34,35), and the third his rights of association, specifically:

> [Whether] law licensees [may] be forced to associate with an Integrated Bar engaged in political activity beyond that in which the [Florida] Supreme Court has a specifically defined compelling State interest?

(P.A. 35)

Mr. Schwarz's arguments seemed to ask the Florida Supreme Court to define the scope of its permissible political activity *under the state constitution* and he contended that the Bar's engagement in politics "is inconsistent with separation of powers, an independent judicial department, and non-partisan selection, appointment, and retention of the judiciary." (P.A. 41) He further contended that his proposed amendment was *not* concerned with funding of political activities but was intended to prevent "any Bar political

activity beyond subject matters appropriate to the proper powers of this Court through the agency of the Bar." (P.A. 44)

The Florida Supreme Court referred the proposed amendment to Rule 2-3.2(c)(4) to the Florida Bar's Judicial Council for study and recommendations. (P.A. 47-51) *See The Florida Bar Re Schwarz*, 526 So.2d 56 (Fla. 1988). After holding public hearings, the Judicial Council recommended the following subject areas as appropriate for legislative activities of the Bar:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and
>
> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

(P.A. at 54); *The Florida Bar Re Schwarz*, 552 So.2d 1094, 1095 (Fla. 1989).

The Judicial Council also recommended that the Bar be permitted to engage in legislative initiatives outside the above five, but only if:

> (1) The issue is recognized as being of great public interest;

(2) lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

(P.A. at 54,55); *The Florida Bar Re Schwarz*, 552 So.2d at 1095.

The Florida Supreme Court adopted all of the above recommendations as guidelines to be followed with respect to determining the scope of permissible legislative activities of the Florida Bar. (P.A. 60) In so acting, the court pointed out that the Rules required the Bar to focus specifically on the question of whether a given subject was one in which it could become involved and it cautioned the Board of Governors to avoid, to the extent possible, those issues "carry[ing] the potential of deep philosophical or emotional division among the membership of the Bar." (P.A. 59) The court also emphasized that any member in good standing of the Bar could readily question the propriety of any legislative position taken by the Board of Governors by timely filing a petition with the court. Finally, the court observed that in view of its amendment to Rule 2-9.3 any member of the Bar could obtain partial rebate of bar dues by registering his or her objection to legislative positions taken by the Florida Bar. In amending Rule 2-9.3, the Court stated that bar members could still bring injunctive actions against unauthorized bar activities and expenditures. *See The Florida Bar re Amendment to Rule 2-9.3*, 526 So.2d 688 (Fla. 1988).[2]

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2 As the court noted, the Bar must publish its adoption of a legislative position in the next issue of the Florida Bar News, a bi-weekly publication sent to each member of the Bar. (P.A. 59,60)

The decision of the Florida Supreme Court is, as it pointedly stated, much narrower than that of the California Supreme Court in *Keller v. The State Bar of California*, 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal.Reptr. 542 (1989), *cert. granted*, ___U.S.___, 110 S.Ct. 46, 107 L.Ed.2d 15 (1989) (See P.A. 57). The California decision held that the California Bar was authorized to comment generally upon proposed legislation. It recognized no means by which a bar member could challenge the propriety of a legislative position nor any entitlement to a refund of bar dues, no matter the issue or the depth of disagreement.

SUMMARY OF ARGUMENT

Petitioner seeks review of a decision of the Florida Supreme Court adopting certain guidelines to be followed by the Florida Bar in its legislative activities. Assuming that a given legislative position asserted by the Bar is not within those fundamental purposes represented by guidelines 1-5, *ante* p. 4, any member of the Bar may seek a refund by following the procedure set forth in Rule 2-9.3.

Petitioner does not contest the constitutional adequacy of the procedures prescribed in Rule 2-9.3, and therefore presents no substantial federal question that would warrant this Court's review. This Court has considered whether a union may use compulsory dues assessed against non-member employees to support political activities that a non-member employee may oppose, *see Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Chicago Teacher's Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and ruled that the union must provide a constitutionally adequate procedure by which a dissenter could seek a refund of those dues used to support the opposed political activity. Petitioner here not only fails to suggest that the Florida Bar's refund procedure is constitutionally defective, but he also fails to

cite or discuss *Abood* and *Chicago Teacher's Union* and to show that those cases are not dispositive of any constitutional issue raised by the decision of the Florida Supreme Court.

It also appears that petitioner seeks to have this Court decide whether the adoption of the guidelines is within the scope of authority of the Florida Supreme Court under the state constitution and whether the court properly delegated its authority. This is strictly an issue of state law. The petition utterly fails to show how such delegation of authority affects petitioner's constitutional rights if the court and the bar provide a refund procedure consistent with the rulings in *Abood* and *Chicago Teacher's Union*.

ARGUMENT

I. AN INTEGRATED STATE BAR DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF ASSOCIATION OF ITS MEMBERS BY RESERVING THE RIGHT TO ASSERT A POSITION ON ISSUES OF GREAT PUBLIC INTEREST AFFECTING THOSE LIKELY TO COME INTO CONTACT WITH THE JUDICIAL SYSTEM IF IT PROVIDES A METHOD FOR REFUNDING A PROPORTIONATE AMOUNT OF THE BAR DUES OF THOSE WHO DISAGREE WITH AN ASSERTED POSITION.[3]

In *Lathrop v. Donohue*, 367 U.S. 820 (1960), the plurality decision held that the Wisconsin integrated bar, whose membership requirement was limited to the compulsory payment of reasonable annual dues, did not by virtue of such requirement impinge upon "protected rights of association." *Id.* at 843. The question the Court left open was whether a bar member "may constitutionally be compelled to contribute his financial support to political activities which he opposed." *Id.* at 848; *see also, Id.* at 870 (Black, J., dissent-

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3 Respondent has restated the questions presented to reflect what it believes to be the single *federal* constitutional issue posed by the decision below. Respondent acknowledges it is uncertain whether the two questions presented, as stated and argued in the petition for writ of certiorari, raise any other federal constitutional issue. The scope of the Florida Supreme Court's power under the state constitution, and whether any delegation of that power is beyond its authority, issues seemingly raised by petitioner's second question, would be strictly questions of *state* law. The petition does not attempt to elucidate this issue. Should this Court decide to grant certiorari, it would be beneficial for the Court to state the precise issue it desires the parties to address.

ing).[4] Contrary to what petitioner contends is the justification for this Court's review, if a constitutional issue is posed by this case it is not the issue "postponed" in *Lathrop*. (*See* petition at 9.)

It is clear that at the time of the *Lathrop* decision, the Wisconsin Bar provided no means by which any bar member could request a refund of that part of his dues used to support political positions to which he objected. The Florida Bar, however, has adopted a procedure by which dissenting members may obtain a refund. *See* Rule 2-9.3 (P.A. 31) and *The Florida Bar re Amendment to Rule 2-9.3*, 526 So.2d 688 (Fla. 1988). Contrary to petitioner's claim, the decision below, which underscores a dissenting lawyer's right to a refund, is consistent with all controlling or analogous federal cases.[5]

In *Lathrop* this Court, citing *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), drew an analogy between an integrated bar and compelled membership in a union. In neither case did it find that compelled membership as a condition of employment violated the First Amendment. More recent decisions, however, have addressed the issue of whether compulsory union dues may be spent on lobbying or political or ideological activities that are not germane to the union's fundamental purpose, i.e., collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), directly addressed this question, and the Court held that under the First Amendment non-union employees who were required to pay union dues under an agency shop agreement

---

4 To avoid infringing the First Amendment rights of lawyers who disagreed with political positions taken by the Wisconsin Bar, Justice Black would have required a refund of the dues exacted to support the bar's political activities. 367 U.S. at 877.

5 The argument in the petition for certiorari does not attack, and in fact does not even mention, Rule 2-9.3. We therefore assume its constitutional adequacy as a refund procedure.

could not be compelled to support the union's ideological activities that were unrelated to collective bargaining. *Abood* made clear, however, that the union was free to undertake political activity on any issue of interest to it, as long as it did not finance such activity with the dues of the objectors. *See* 431 U.S. at 235-36.

The Court suggested at least two possible remedies for the dissenting employees in *Abood*: first, an injunction against expenditure by the union of a sum equal to the dissenters' pro rata share of the amount to be spent for the objectionable political activities; and second, restitution to the dissenters of a proportionate fractional share of the dues used for political purposes. *Id.* at 238. Although the Court did not explain the required remedy in detail, the *Abood* decision unarguably stands for the proposition that an appropriate refund procedure would cure any First Amendment objection.

In *Chicago Teacher's Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), this Court set forth the procedural safeguards to be followed by a union that engages in political activities supported by compulsory dues.[6] Because petitioner asserts no constitutional deficiency in the Florida Bar's refund procedure, it should suffice to say that the decision required the union to minimize the risk of using nonunion employees' contributions even temporarily for political purposes and to provide, as to any disputed amounts,

---

6 Before setting forth the requisite protections the Court observed that "the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." 475 U.S. at 304, n. 13. One of the two questions presented here, as phrased by the petitioner, makes reference to the Fifth as well as the First Amendment. Petitioner's Fifth Amendment claim, *if any*, is not given the slightest elaboration in the petition's argument. This brief will therefore not engage in speculative analysis of possible Fifth Amendment considerations.

a reasonably prompt decision by an impartial decisionmaker. The Florida Bar's refund provision, Rule 2-9.3, requires the Bar's executive director, upon receiving a written objection, to "promptly determine" the pro rata amount of the objector's dues at issue and to place that amount in escrow. (P.A. 31, 32) The escrow figure is to be independently verified by a certified public accountant. *Id.* The Board of Governors has 45 days to make a refund or to refer the matter to arbitration. The arbitration panel has 45 days to make its decision, and any refund must include interest at the legal rate from the date the objection was received. (P.A. 32, 33) The Bar bears the burden of proof in such proceedings. *See The Florida Bar Re Schwarz*, 552 So.2d 1094, 1098 (Fla. 1989).[7]

The petition for certiorari nowhere suggests that this Court's decisions on the use of union dues for political activities would not control the corresponding practices of an integrated bar. The petition cites but does not discuss the decision of the Eleventh Circuit in *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986), that relied on the paradigm of the "agency shop," as explicated by this Court in *Abood* and *Chicago Teacher's Union*, to hold that the

---

7 Where a union routinely engages in political activity unrelated to its collective bargaining duties, it may, following proper procedures, deduct in advance from the dues owed by non-union employees a proportionate amount attributable to the political activity. *Abood, supra*, at 240; *Chicago Teachers Union, supra*. The Florida Supreme Court's decision below authorizes the Florida Bar to lobby in five specific areas that clearly relate to the Bar's stated purposes, an activity which, following the analogy to unions, may be supported by dues. Petitioner does not appear to disagree with the use of compulsory dues to support legislative initiatives in these five areas. The decision also allows lobbying on certain issues of "great public interest." Because this is a new guideline, no data exist that would support an advance deduction of objectors' dues, assuming *arguendo* the guideline allows political activity unrelated to the bar's stated purposes. The petition for certiorari does not contend an advance deduction is necessary.

Florida Bar could use compulsory dues to finance lobbying "only to the extent that it assumes a political or ideological position on matters that are germane to the Bar's stated purposes." 798 F.2d 1569. The Eleventh Circuit suggested a refund procedure as one possible remedy. *Id.* at 1570, n. 5. As a direct consequence of the *Gibson* decision, the Florida Supreme Court amended Rule 2-9.3 to provide for refunds and, by the decision below, limited most if not all lobbying activity to five subject areas clearly germane to the Bar's stated purposes.

Although it is far from clear in the petition for certiorari, Mr. Schwartz apparently objects to the guideline allowing the Bar to take a position on an issue of "great public interest." Whether the Florida Supreme Court intends to allow the Bar to lobby on an issue unrelated to the Bar's stated purposes remains to be seen. The court cautioned the Bar against interpreting the provision too broadly, and any such issue the Bar does address "must affect the rights of those likely to come into contact with the judicial system." But given the existence of the refund provision in Rule 2-9.3, how broadly or narrowly this criterion may be construed by the Bar or the court presents no constitutional issue. As the Eleventh Circuit stated in *Gibson*, relying on *Abood* and *Chicago Teacher's Union*:

> [T]he Bar may speak as a group *on any issue* as long as it does so without using the compulsory dues of dissenting members.

798 F.2d at 1570 (emphasis added).

As reasons for granting certiorari, petitioner contends that the Florida Supreme Court decided a federal question in conflict with decisions of federal courts of appeal as well as decisions of this Court, or, alternatively, decided an important question of federal law which has not been, but should be, settled by this Court. (Petition at 5) These con-

tentions are not borne out by the argument in the petition. Although petitioner cites a number of allegedly conflicting First Amendment cases decided by this Court, not one concerns a state bar's or union's use of compulsory dues to engage in political activities a member or forced contributor may oppose. The petition does not even cite or discuss this Court's decisions in *Abood, supra,* or *Chicago Teacher's Union, supra,* the cases most analogous, much less suggest how the decision below could conflict with them.

This Court's ruling in *Keller v. State Bar of California,* ___ U.S. ___, No. 88-1905, decided June 4, 1990, underscores the controlling effect of *Abood* and *Chicago Teacher's Union* in stating that "[w]e believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *[Chicago Teacher's Union v.] Hudson.*" Slip. op. at 14. The Court refrained from deciding "whether one or more alternate procedures would...satisfy that obligation" leaving the question "for consideration upon a more fully developed record." *Id.* As stated, the petition does not seriously question the Florida Bar's refund procedure. Hence, in offering this remedy, the Florida Bar has met its constitutional obligation under *Abood* and *Chicago Teacher's Union.*

Nor does the petition show any conflict with a decision of a federal court of appeals. Obviously, the adopted guidelines do not conflict with *Gibson, supra,* since, as a direct consequence of that ruling, any member of the Florida Bar may have a refund of dues used to support political positions he or she opposes. *See* 798 F.2d at 1569-70. Neither is there any apparent conflict with *Romany v. Colegio de Abogados de Puerto Rico,* 742 F.2d 32 (1st Cir. 1984), *on remand, Schneider v. Colegio de Abogados de Puerto Rico,* 682 F.Supp. 674 (D.P.R. 1988). There, the Puerto Rican Bar Association engaged in a wide range of ideological activities that it financed with compulsory dues. The Bar Association's remedy

for dissenting lawyers, ultimately found inadequate by the *district court* on remand, differed from that of the Florida Bar in many respects.[8] Petitioner does not compare the defective Puerto Rican remedy to that of the Florida Bar or suggest even in the most conclusory fashion that the Florida Bar remedy is inadequate. In view of the fact that a bar may speak out on *any issue* as long as it does so without using compulsory dues of dissenting members, *Gibson, supra*, at 1570, we submit this is a fatal defect in the petition.

The exact nature of the constitutional question presented here, and whether it is substantial, is conjectural at best. What the petition's conclusion finally asks this Court to do is not decide a specific question, but rather to "...require [the Florida Supreme Court] to define or define for the Florida court the meaningful and permissible limits of the scope, manner and method in intruding upon petitioner's First and Fifth Amendment rights." (Pet. at 10) The petition, however, fails to show how constitutional rights have been violated, fails to show conflict with any federal court decision, fails to even state a substantial and unsettled federal question it would have this Court address, and thus fails to meet the most basic criteria of Supreme Court Rule 17.1.

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8 For example, a member of the Puerto Rican Bar Association was not permitted to object to the use of compulsory dues for *any* of the bar's broadly and vaguely stated purposes. 682 F.Supp. 686-688. Moreover, the bar escrowed an arbitrary 15% of dues that dissenting attorneys could not claim until the end of the bar's fiscal year. *Id.* In contrast, the Florida Bar Rule provides the determination to be made by an impartial panel is whether the dues have been used for an acceptable purpose under *applicable constitutional law*, not just the Bar's rules. Any use for legislative activity on a question of "great public interest" could be challenged under this criterion. And, unlike the Puerto Rican rule, the Florida procedure is expeditious; a dissenting attorney does not have to wait a year, or possibly more, for the refund. (P.A. 32)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States Post Office or mailbox, with first-class postage prepaid, addressed to:

Thomas R. Schwarz, Esquire
4561 Northwest 79th Avenue
Lauderhill, Florida 33351

_____/s/_____
LOUIS F. HUBENER
Assistant Attorney General

No. 89-1591

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

Thomas R. Schwarz,

Petitioner,

v.

The Florida Supreme Court, et.al.,

Respondents.

_____/

Brief Of Amicus Curiae In Support of Petition For Writ of Certiorari To The Florida Supreme Court

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INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae is submitted pursuant to Rule 37 in the format denoted by Rule 37.6. It is accompanied by written consents to the filing of the brief provided by the petitioner and respondents pursuant to Rule 37.2.

Amicus Curiae is a member of the Florida Bar and is governed by the rules of the Supreme Court of Florida that are challenged by the petition. Amicus Curiae firmly believes that the individual constitutional rights of no American can be safeguarded if the state courts and legislatures are permitted to limit the first amendment rights of lawyers as a condition of being permitted to earn a livelihood in the field. Toward this end,

Amicus Curiae was a participant in proceedings below in the Florida Supreme Court and is an Amicus Curiae in Gibson v. Florida Bar, No. 89-3388, a related Florida case now pending in the United States Court of Appeals for the Eleventh Circuit, and in Keller v. State Bar of California, No. 88-1905, a similar case now pending in this Court.

SUMMARY OF ARGUMENT

In addition to the reasons stated in the petition, the decision below violates the first amendment rights of Petitioner and Amicus Curiae in that the procedure prescribed to protect those rights fails to satisfy the minimum requirements of Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) in four respects:

1. It does not permit dissenters to deduct in advance that portion of the dues that fund the BAR's ideological legislative lobbying activities, but instead employs a constitutionally defective rebate system.

2. It does not permit dissenters to object generally to all the BAR's ideologically

lobbying activities, but instead unconstitutionally requires dissenting members to identify in writing each specific position they dissent to.

3. It does not require the BAR to make a detailed identification of the expenditures it can compel all members to support financially, but instead unconstitutionally requires dissenting members to identify specific positions they object to.

4. It does not provide a reasonably prompt and impartial process to decide the validity of objections of dissenters, but instead imposes an unconstitutional costly and cumbersome process.

ARGUMENT

Amicus Curiae supports the petition for writ of certiorari on the grounds stated by Petitioner Schwarz. In addition, Amicus Curiae asserts that the decision of the Florida Supreme Court from which relief is sought violates the first amendment rights of Petitioner and Amicus Curiae, as those rights have been acknowledged by this Court in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), Chicago Teacher's Union v. Hudson, 475 U.S. 292 (1986) and other cases now under review in Keller.

Specifically, Amicus Curiae asserts that the decision below does not prevent infringement of first amendment rights of members of The Florida Bar who oppose being required to

provide financial support for ideological political lobbying activities of The Bar to which they dissent. Specifically, neither of the two methods for seeking relief prescribed and referred to by the Florida Supreme Court in the decision below satisfies the requirements of Abood and Hudson.

First, the decision below states:

> "In any event, we also wish to make clear that any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court." (P.A-59, Petition.)

Amicus Curiae asserts that the decision below provides inadequate guidelines (pp. A-54, 55, Petition) to permit objectors to understand the basis of any decision that the Florida Court might make. Indeed, any petition made pursuant to the language quoted above would

merely be asking the Florida Supreme Court to substitute its judgment for that of the Bar as to what is of "great public interest," what things lawyers are "especially suited" to evaluate, and what subjects affect "the rights of those likely to come into contact with the judicial system." In short, the application of this rule imposes not a "rule of law" but a "rule of men," which runs against one of the deepest traditions of constitutional governance.

Second, the decision below states:

> In The Florida Bar re Amendment to Rule 2-9.3, 526 So.2d 688 (Fla. 1988), we approved an amendment to the Rules Regulating The Florida Bar to provide the mechanism for a lawyer who objects to legislative positions taken by The Florida Bar to obtain a partial rebate of bar dues. As part of the process, The Florida Bar is required to publish notice of adoption of legislative positions in The Florida Bar News <u>in the issue immediately following the board meeting at which the positions are adopted</u>. In this manner, lawyers

> are alerted to the legislative positions being taken by The Florida Bar and by registering their objections they may be relieved of paying for their share of the expense attributable to the advocacy of the legislative positions with which they disagree. Consistent with the response filed by The Florida Bar in this action, we ask the Board of Governors to submit proposed amendments to this rule which will make clear that the Bar carries the burden of proof in such proceedings and providing that the names of objecting bar members, at their option, be kept private.

(pp. A-59, 60, Petition). (Underlining supplied).

This method of relief fails to satisfy the minimum requirements of Abood and Hudson in four respects.

1. It does not permit dissenters to deduct in advance that portion of the dues that fund the BAR's ideological legislative lobbying activities, but instead employs a constitutionally defective rebate system.

2. It does not permit dissenters to object

generally to all the BAR's ideologically lobbying activities, but instead unconstitutionally requires dissenting members to identify in writing each specific position they dissent to.

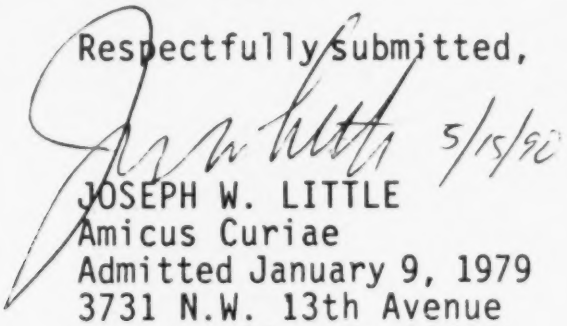
3. It does not require the BAR to make a detailed identification of the expenditures it can compel all members to support financially, but instead unconstitutionally requires dissenting members to identify specific positions they object to.

4. It does not provide a reasonably prompt and impartial process to decide the validity of objections of dissenters, but instead imposes an unconstitutional costly and cumbersome process.

CONCLUSION

In sum, for these additional reasons, Amicus Curiae respectfully urges this Court to grant the petition and the relief sought.

Respectfully submitted,



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Joseph W. Little

No. 89-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS R. SCHWARZ,
Petitioner,

vs.

THE FLORIDA SUPREME COURT,
acting by Justices Raymond Ehrlich, Ben F. Overton, Leander J. Shaw, Rosemary Barkett, Stephen H. Grimes & Gerald Kogan, Dissent by Parker Lee McDonald,
Respondent.

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

The within brief is filed by the petitioner pursuant to Rules 15.6[1] and 15.7[2] of the Rules of the Supreme Court.

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[1] Respondent claims for the first time in its brief in opposition that the necessity for specific definition in the delegation of power is strictly a state law matter (Respondent's Brief @ 7) and, on that basis, that the petitioner's second question presented for review has not been properly raised.

[2] This Court's June 4, 1990 decision in *Keller v. State Bar of California*, Case No. 88-1905, was not available to petitioner at the time of his original petition, and constitutes new and relevant authority.

MATTERS NOT AVAILABLE AT TIME OF PETITIONER'S INITIAL FILING

The decision of this Court on June 4, 1990 in *Keller v. State Bar of California*, Case No. 89-1905, had not been rendered when the petition for writ of certiorari in this cause was filed. Although the opinion and decision became available to respondent on June 14, 1990, the latter has nonetheless continued to cite instead to the now-reversed decision of the Supreme Court of California reported at 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal.Rptr. 542 (1989, cert. granted __ U.S. __, 110 S.Ct. 46, 107 L.E.2d 15 (1989)). (Respondent's Brief in Opposition @ pps. 6, 13).

The Florida Supreme Court's decision in *The Florida Bar Re Schwarz*, 552 So.2d 1094 (Fla.1989), review of which is sought herein, similarly relied upon that California state decision in fashioning the scope of its power to compel association of bar licensees in political matters. (Appendix to Petition @ A - 57-58).

In reversing the Supreme Court of California, this Court in its June 4, 1990 decision opined, inter alia:

> "Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services, The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.
>
> * * * * * * *
>
> We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.' *Lathrop*, 367 U.S., at 843 (plurality opinion).

* * * * * * *

> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession."

This Court's opinion was restricted to the use of mandatory dues. It declined to rule in the first instance upon the claim that forced association "with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*.." These cases and this Court's *Keller* decision hold that mandatory bar dues may be used for political activity provided, as stated in the *Keller* syllabus:

> "The State Bar's use of petitioner's compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. Pp. 6-14."

Both the ex parte petition below and the instant petition for writ of certiorari raise the question of whether, vel non, forced association with political or ideological activity beyond the scope of mandatory bar dues use — without regard to refund procedures — infringes the petitioner's First Amendment rights of association. Both petitions stake out the concept that unless the delegating power specifically defines the area of permissible activity, restricted as required by

Keller, the intrusion is so pervasive that forced association is rendered constitutionally impermissible.

ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

The action brought by petitioner in the Florida Supreme Court (Appendix to Petition @ A - 1-12) did not concern itself with the refunding of dues or other financial considerations. It sought, instead, definition by the Florida Supreme Court of its claimed powers to compel political association of the petitioner with its agency, the Florida Bar. Such definition was alleged to be required by the Florida Constitution and by the United States Constitution. This was explicitly set out in the ex parte petition to the Florida Supreme Court (Appendix to Petition @ A - 4-5):

> "(12) Petitioner states that:
>
> (a) The constitutional provisions of Articles I, II, and III of the Florida Constitution.
>
> (b) The provisions of Amendments I, IV, and V of the United States Constitution, and
>
> (c) . . . all require that this Court define and limit the political activity delegated to its arm (The Florida Bar)."
>
> * * * * * * *
>
> (18) Your petitioner states that his forced association with this Court's arm in its political activity is regarded as dishonorable as to him and others similarly situated."

At the time (June 4, 1987) the ex parte petition was filed in the Florida Supreme Court, both that court and its arm, the Florida Bar, were operating under the concept that "the administration of justice and advancement of the science of jurisprudence" defined the appropriate scope of forced member association with political activity. The Circuit Court of Appeals for the Eleventh Circuit had in 1986 concluded that this description was "amorphous." *Gibson v. Florida Bar*, 798 F.2d 1564 (CCA 11, 1986).

Pursuant to the ex parte petition and intervening proceedings the Florida Supreme Court, in *The Florida Bar Re Schwarz*, 552 So.2d 1094 (Fla.1989), adopted a new definition of scope of permissible political activity. The United States constitutional limitations affecting that definition were raised and considered. (See, dissent of Justice McDonald, Appendix to Petition @ A-61).

Respondent's position that the Florida Supreme Court's opinion in *The Florida Bar Re Schwarz*, supra, decided the claims of the ex parte petition on the exclusive basis of state law, is both new and specious. The petition references to the 1975 Florida Constitution (Appendix to Petition @ A-4, paragraph 12a) are to the specific and mandatory provisions thereof respecting separation and limitation of powers of the governmental departments. Article I, Section 1 reserves political power not specifically delegated to the people. Article II, Section 3 specifically prohibits one department of government from exercising power delegated to another. Article V sets out the powers of the Judicial Department. None are mentioned in and do not form the basis for the Florida Supreme Court's opinion and decision here sought to be reviewed.

Statements of the legal bases for petitioner's ex parte petition to the Florida Supreme Court were precise and definitive: (1) The specific provisions of the Florida Constitution above noted; (2) Rights under the First and Fifth Amendments to the United States Constitution; and, (3) The general ethical necessities of an impartial judiciary. The impingement of the Florida Supreme Court's activities on petitioner's right to freedom of association was underscored in Paragraph 18 of the ex parte petition. (Appendix to Petition @ A-5).

The opinion and decision of the Florida Supreme Court does not discuss the state constitution provisions. It cleaves to consideration of federal constitutional limitations. In effect, the court holds that "great public interest, special lawyer skills, and the fact that the public reaches the courts" justify "sinful and tyrannical" compelled associa-

tion. The court would remedy this impingement by the "post hoc" refund of dues money to the offended licensees.[3]

The ex parte petition was as noted, filed in the Florida Supreme Court to obtain a definition of the scope and extent of bar licensees' forced association with political ideology. It is clear that absent such definition, a forced political association is open-ended, and it cannot be determined in the first instance if a compelling state interest is involved.

Inasmuch as the Florida Supreme Court, which compels the association, does not itself exercise the power to engage in political activity but, rather, delegates that power to the private citizens who comprise its arm, the Florida Bar, such definition must be sufficiently precise to avoid constitutional limitations on vagueness. The ex parte petition was designed to satisfy both the requirements of specificity and avoidance of definitional vagueness.

The Florida Supreme Court's opinion and decision in *The Florida Bar Re Schwarz*, supra, adopts guidelines in five particular areas which basically track the amendment on this subject proposed by petitioner in the ex parte petition and which are appropriate under *Keller*. By the addition of the three areas set out in the Florida Supreme Court's opinion, however (Appendix to Petition @ A-55), that court reintroduced amorphous, open-ended, subjective criteria which permit undefined intrusion into the bar licensees freedom of political association, contrary to the directions of this Court in *Keller*. It is a return to what the Eleventh Circuit concluded was "amorphous": The "advancement of the science of jurisprudence."

The Florida Supreme Court has left the protection of its licensees' constitutional rights to free association to the circumspection and decision of its Bar management.

---

[3] While the question of dues refunds was not raised, petitioner does not believe that such refund procedures can remedy; forced political association under an amorphous grant of power. The Florida procedure is shown in the Appendix to Petition @ A - 31-33. It is clearly a mare's nest.

CONCLUSION

The petition for writ of certiorari, it is submitted, here presents the opportunity for this Court to instruct the Florida Supreme Court — and all other state courts — upon a "more fully developed" and focused record, on the necessity for limiting forced political association of its licensees to matters germane to its agency; mission and on delegating its power with precision, so that parties exercising political power are not making policy decision and those affected can, with the gift of prophecy, determine the legal propriety of the action affecting them.

If the Florida Supreme Court wishes to continue the forced political association of its licensees on an open-ended "amorphous" basis, such forced association is then so pervasive that the integrated bar system must fail for violation of its licensees' First Amendment rights to free association. *Romany v. Colegio de Abogados*, 742 F.2d 32 (CCA 1, 1984); *Schneider v. Colegio de Abogados*, 682 F.Supp. 674 (DPR, 1988).

DATED: June ___, 1990.

Respectfully submitted,

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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RULES REGULATING THE FLORIDA BAR

Chapter 2, Section 3.2(c)(4) 1

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

This brief is filed by respondents pursuant to Rule 15.7 of the Rules of the Supreme Court.

AUTHORITY NOT AVAILABLE AT THE TIME OF FILING RESPONDENTS' BRIEF IN OPPOSITION

On July 23, 1990, the Court of Appeals for the Eleventh Circuit decided *Gibson v. The Florida Bar*, ___ F.2d ___ (11th Cir. 1990) (1990 WL 91077). The opinion is reproduced in the appendix to this brief.

At issue in *Gibson* was the constitutionality of Florida Bar Rule 2-3.2(c)(4). The rule establishes a procedure by which a bar member who objects to a legislative activity undertaken by the Florida Bar may obtain a refund of that portion of his annual dues used by the Bar to support that activity.

We maintain, contrary to petitioner's assertions, that the issues addressed by the Florida Supreme Court in the decision petitioner asks this Court to review were the scope of permissible legislative activities and the constitutionality of the refund procedure. The decision does not address the question of whether the petitioner's First Amendment rights of association may be hypothetically violated by a rule that permits the Bar to take a public position on an issue of great public significance that relates to the judicial system when it does not use his money to promote that position. The decision of the Eleventh Circuit in *Gibson* upholds Rule 2-3.2(c)(4), merely adding the requirement that the Bar calculate interest due on a refund from the date that it

received the objecting member's bar dues, rather than from the date it received the member's objection.

The Eleventh Circuit reiterated its earlier statement in *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986) ("Gibson I") that:

> [T]he Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.

App. 4. It held that an advance deduction of dues was not necessary and that the interest bearing escrow account approach to be used by the Bar was constitutionally sufficient under *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984), and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303-04 (1986).

The decision in *Gibson v. The Florida Bar*, ___ F.2d ___ (11th Cir. 1990) (1990 WL 91077) supports the decision of the Florida Supreme Court in *The Florida Bar Re Schwarz*, 552 So.2d 1094 (Fla. 1989).

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APPENDIX

Robert E. Gibson v. The Florida Bar, et al. A-2

ROBERT E. GIBSON, Plaintiff-Appellant,

v.

THE FLORIDA BAR and Members of the Board of Governors, Defendants-Appellees.

No. 89-3388.

United States Court of Appeals, Eleventh Circuit.

July 23, 1990.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, Chief Judge, ANDERSON and CLARK, Circuit Judges.

TJOFLAT, Chief Judge:

In this case, the plaintiff, a member of the Florida Bar, appeals the district court's dismissal of his suit challenging the Florida Bar's procedures for handling objections to the Florida Bar's use of compulsory bar dues to fund its political lobbying. The district court held that the procedures satisfied the constitutional requirements articulated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). We affirm in part and reverse in part.

I.

On March 27, 1984, the plaintiff, Robert E. Gibson, filed a complaint against the Florida Bar and the members of its board of governors (the Bar) seeking a declaratory judgment and injunctive relief. Gibson claimed that the Bar was

violating his first and fourteenth amendment rights[1] by using a portion of his compulsory dues to fund political lobbying. Specifically, Gibson challenged the Bar's use of compulsory dues to fund its campaign in opposition to a constitutional initiative known as "proposition one."[2] He also generally challenged the Bar's use of compulsory dues to fund political lobbying. Gibson immediately moved for a preliminary injunction to prevent the Bar from further advocating its position against proposition one.

On that same day, the Florida Supreme Court issued an order removing proposition one from the general election ballot on the ground that it failed to comply with the single-subject requirement of Fla. Const. art. XI, § 3. *See Fine v. Firestone*, 448 So.2d 984 (Fla. 1984). Accordingly, on March 28th, the district court denied Gibson's request for a preliminary injunction. The case then proceeded to trial, and in August 1985, the Court issued a final judgment upholding the validity of the challenged activity and denying Gibson's request for a permanent injunction.

In its judgment, the court first held that the Florida Supreme Court's decision in *Fine* did not moot Gibson's suit because Gibson still challenged the Bar's general practice of funding political advocacy with compulsory bar dues. The court then held that under *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1976), the Bar's general practice was constitutionally permissible.

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1 The first amendment, which the fourteenth amendment makes applicable to the States, *see Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), provides in pertinent part: "Congress shall make no law...abridging the freedom of speech...; or the right of the people peaceably to assemble.... " U.S. Const. amend 1. For convenience, we label Gibson's claim a first amendment claim.

2 Proposition one, modeled after California's proposition thirteen, proposed an amendment to the Florida Constitution that would limit the amount of revenue that the State could collect through taxes.

The court reasoned that "the State may intrude upon plaintiff's First Amendment rights where the intrusion is justified by a sufficiently important state interest, and so long as the intrusion is'closely drawn.'" In the court's view, the Bar's purposes as articulated in the Integration Rule of The Florida Bar[3] constituted a "sufficiently important state interest." Moreover, the Bar's policy on political advocacy

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3 The Preamble to the Integration Rule provides, in pertinent part:

> To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence, the following principles are expressly adopted by the Court:
>
> (a) The Florida Bar, a body created by and existing under the authority of this Court, is charged with the maintenance of the highest standards and obligations of the profession of law....

was sufficient to ensure that the Bar's political positions[4] would be closely enough related to these important state interests.

Gibson appealed this judgment. In *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986) [hereinafter *Gibson I*], a panel of this court reversed the district court and remanded the case for further proceedings. After a review of Supreme Court cases on the constitutionality of compulsory membership dues and of the use of those dues to support political activities, *e.g.*, *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); *Railway Employees' Dep't Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Ellis v. Railway Clerks*, 466

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4 Standing Board Policy 900 provided, in pertinent part:

(a) The purposes of The Florida Bar are set forth in the Integration Rule. Neither The Florida Bar nor any of its committees or sections may take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Integration Rule.

(b) The Bylaws of The Florida Bar set forth the restrictions on establishing a legislative policy. Article VI, Section 2 of the Bylaws provides that:

> No legislative matter shall be recommended, approved, disapproved or endorsed by The Florida Bar unless such action is initiated by a written report and recommendation of a committee and approved by a majority vote of the active members present at the [annual] meeting; or, legislative matters may be recommended, approved, disapproved, or endorsed on behalf of The Florida Bar at any time by two-thirds vote of the members of the Board of Governors present at the meeting, and during the time when the Legislature is in session the Executive Committee may act upon pending or proposed legislation.

U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1985),[5] the panel concluded that the Bar's use of compulsory dues to support political activity would be constitutional if a "compelling interest" supported the Bar's activity and if the Bar had used the "least restrictive means" of achieving that interest. *Gibson I*, 798 F.2d at 1569. Applying this analysis, the panel held that the district court had not adequately evaluated whether "certain positions taken by the Bar were sufficiently related to its basic function to justify the expenditure of compulsory dues" and therefore remanded the case to the district court for further findings on this issue. *Id.*

At the conclusion of its opinion, the panel "stressed" that it had addressed "only the use of compelled fees by the Bar." As the panel noted,

> the union was free to politicize on any issue ofinterest to that group.... Only the use of compelled funds was prohibited for issues unrelated to collective bargaining.... Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.

Id. at 1570 (citations omitted). In a footnote, the panel further explained that:

> the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program,

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5 The panel held that these cases, almost all of which involve union rather than bar associations, also controlled in cases involving bar associations. *See Gibson I*, 798 F.2d at 1568-69. The Supreme Court has also expressly adopted this position in *Keller v. State Bar*, ___ U.S. ___, ___, 110 S.Ct. 2228, 2235-37, ___ L.Ed.2d ___ (1990). I discuss that case in more detail below. *See infra* note 12.

but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying.

Id. at 1570 n. 5. At the time of the panel's disposition, however, the Bar had no such program or procedure, and the panel therefore remanded the case to the district court for findings on the propriety of the Bar's political activity.

In November 1986, the Bar amended Standing Policy 900 to include a set of refund procedures. The Bar then moved the district court for a "judgment on the mandate" on the grounds that these procedures complied with the requirements announced in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).[6] The Bar's motion in effect requested leave of court to amend its answer to Gibson's complaint and to file a counterclaim. The amended answer would assert that the controversy described in Gibson's complaint was moot, and the counterclaim would request a declaration that the Bar's new procedures passed constitutional muster. The court implicitly gave the Bar leave to proceed in this fashion[7] and, in March 1987, issued an order holding the case in abeyance for seventy days to allow for possible action by the Florida Supreme Court on the Bar's amendments to Standing Policy 900. The Bar subsequently undertook to amend its bylaws–a process requiring approval by the Florida Supreme Court–in order to incorporate the new procedure. The district court therefore extended the abeyance until the Florida Supreme

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6 *See infra* slip op. at 3879-3881, ___ F.2d at ___, ___ (discussing *Chicago Teachers*).

7 The parties submitted no revised pleadings; rather, the amendment process took place through the parties' memoranda to the court and hearings before the court.

Court acted. On June 2, 1988, the Florida Supreme Court issued an opinion approving rule 2-9.3, the amended bylaw.[8] *See Florida Bar Re Amendment to Rule 2-9.3 (Legislative*

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8 ~~2-9.3 Legislative~~ Policies

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the board meeting at which the positions were adopted.

(c) Objections to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(d) Composition of arbitration panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as practicable following the decision by the board of governors that a matter shall be referred to arbitration.

The objecting member(s) shall be allowed to choose one member of the arbitration panel. The Florida Bar shall appoint the second panel member, and those two (2) members shall choose a third member of the panel who shall serve as chairman. In the event the two (2) members of

Policies), 526 So.2d 688 (Fla. 1988). In April 1989, Gibson moved the district court to enjoin the application of the rule. After a hearing on the motion, the district court issued a final order in the case. Holding that rule 2-9.3 "meets the safeguards and requirements necessary for protection of members' first amendment rights, as set out in both the case

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the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member to the panel.

(e) Procedures for arbitration panel. Upon a decision by the board of governors that the matter shall be referred to arbitration. The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. The arbitration panel shall thereafter confer and decide whether the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. The decision of the arbitration panel shall be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel shall order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the board of governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, The Florida Bar shall provide such refund within thirty (30) days of the date of the arbitration panel's report, together with interest calculated at the legal rate of interest as of the date the written objection was received by The Florida Bar.

of *Chicago Teachers Union v. Hudson*...and...*Gibson [1]*," the district court denied Gibson's request for injunctive relief and dismissed the case. Gibson appeals, challenging the constitutionality of rule 2-9.3.

II.

A. *The Bar's Procedures.*

As amended, rule 2-9.3 allows the Bar to adopt legislative positions pursuant to the procedures governing legislative activities in the Standing Board Policy 900, *see supra* note 4. If the Bar adopts a legislative position, the rule requires it to publish a notice of adoption in the next issue of The Florida Bar News, which is published twice monthly and mailed to all Bar members.[9] The rule also provides a procedure for handling objections to the Bar's legislative positions. Within forty-five days of publication of the notice of adoption, any member of the Bar may "file with the executive director a written objection to a particular position on a legislative issue." Rule 2-9.3(c). If a member fails to object within that time period, he waives his right to object. Once the director receives the objection, he must determine the pro rata amount of the member's dues that is being used to fund the Bar's political activity and must place that amount in escrow pending determination of the objections' merits.

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9 We take judicial notice of these facts, thereby granting a motion by the Bar that was carried with the case.

The rule gives the Bar forty-five days either to refund the member's pro rata share[10] or to refer the matter to arbitration.

If the Bar chooses to refer the matter to arbitration, it must prepare a written response to the member's objection, serve a copy of the response on the member, and forward a copy to the arbitration panel. The arbitration panel consists of three individuals, one chosen by the objecting member, another chosen by the Bar, and the third chosen by the first two individuals. The panel decides whether the political activity at issue can constitutionally be funded from compulsory bar dues, and its decision is binding on both the objecting member and the Bar. If the panel orders the Bar to refund the member, then within thirty days, the Bar must refund the member's pro rata share with interest, which is calculated at the legal rate from the date the Bar received the member's written objection. *See supra* note 9; *infra* slip op. at 3882, ___ F.2d at ___.

B. *Gibson's Contentions.*

Gibson challenges these procedures on several grounds. His primary contention is that the Supreme Court cases in this area require an advance deduction rather than a refund. He also contends that the Bar's scheme unconstitutionally requires the dissenter to object on an issue-by-issue

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10 The rule does not state whether this refund includes interest. The Bar, however, has indicated throughout this case that its refund procedures do include interest. Presumably, the Bar calculates interest on refunds paid within forty-five days after receipt of the written objection just as it calculates interest on refunds paid pursuant to an arbitration panel's order: "at the legal rate of interest as of the date the written objection was received by The Florida Bar." Rule 2-9.3(e)(4). We discuss the sufficiency of this provision below. *See infra* notes 13-14 & accompanying text.

basis, thus unconstitutionally forcing the dissenter to identify his own position, and that the arbitration panel is impermissibly composed of other Bar members who necessarily have a monetary interest in the dispute. Gibson further claims that even if the refund scheme is permissible, the Bar improperly calculates interest only as of the date the Bar receives the member's written objection.[11] After reviewing the Supreme Court's pronouncements in *Chicago Teachers*, we address these contentions in turn.

C. *Analysis.*

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court considered whether the grievance procedure established by a teachers union to process objections by non-union members concerning the use of their dues was constitutionally sufficient. The union in that case acted as the exclusive collective-bargaining representative of approximately ninety-seven percent of Chicago's public school teachers. Nonmembers received the benefits of union representation without paying dues. In 1982, the union entered into an agreement with the Chicago Board of Education, whereby the Board would deduct "proportionate share payments" from nonmembers' salaries.

The union also established procedures for handling nonmembers' objections about the deductions. Pursuant to these procedures, once the deduction had been made, the nonmember could object within thirty days in writing to the

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11 Gibson also requests an award of retroactive damages in the form of a refund for the proportion of his compulsory dues that the Bar has used to fund its political lobbying in the past. Gibson, however, now makes this request for the first time. He made no request for a refund or for monetary damages in his complaint; nor did he present any evidence on this issue at trial or on remand. We, therefore, do not reach this question.

union president. If both the union's executive committee and its executive board decided against the objector, then the union president would select a single arbitrator from a list maintained by the Illinois Board of Education. If the arbitrator ruled in favor of the objector, then the union would give the objector a rebate and reduce the amount of future deductions for all nonmembers.

When the first paycheck deduction was taken in 1982, several nonmembers objected, contending that the union was using a proportion of their dues for activity unrelated to collective bargaining. The union sent brief responses to the nonmembers, explaining how the proportionate deduction had been calculated and describing the objection procedures. The objecting nonmembers then brought suit in federal court challenging the objection procedures.

The Supreme Court began its evaluation of the procedures with a review of *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). As the Court stated, *Abood* stands for the proposition that, although a public employer may constitutionally designate a union to be an exclusive collective-bargaining representative and require its nonmember employees to pay a fair share of the costs relating to the union's collective-bargaining, the nonmembers cannot constitutionally be required to support political activity by the union that is unrelated to the union's collective-bargaining duties. *Chicago Teachers*, 475 U.S. at 301-02, 106 S.Ct. at 1073 (citing *Abood*, 431 U.S. at 234, 97 S.Ct. at 1799). Thus, "[t]he objective" of the procedures for handling objections "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* 475 U.S. at 302, 106 S.Ct. at 1074 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800).

Applying this standard, the Court determined that the union's procedure was defective in three respects. First, the possibility of a rebate did not adequately ensure against the risk that the objectors' funds would be used even temporarily for an improper purpose. *Id.* 75 U.S. at 305, 106 S.Ct. at 1075. Second, the union's advance reduction of nonmembers' dues was inadequate because the union failed to provide information on how the proportionate share had been determined. *Id.* at 306, 106 S.Ct. at 1075. Third, because the union "entirely controlled" the arbitration procedure "from start to finish," the procedure did not provide for a reasonably prompt decision by an impartial decisionmaker. *Id.* at 308, 307, 106 S.Ct. at 1076-77, 1076.

The Court also considered whether a 100% escrow of the nonmembers' dues would eliminate the procedure's defects. The court held that the escrow would eliminate the procedure's first flaw–the risk that nonmembers' contributions would be temporarily used for impermissible purposes. Indeed, the court expressly stated that a 100% escrow was not necessary; an escrow of the proportion at issue would be sufficient. Even a 100% escrow, however, did not eliminate the procedure's second and third defects. *Id.* at 309-10, 106 S.Ct. 1077-78. The Court therefore held the procedure unconstitutional, concluding as follows:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonable in dispute while such challenges are pending.

Id. at 310, 106 S.Ct. at 1078.

We apply the *Chicago Teachers* holding to the present case in order to determine whether, in light of Gibson's challenge, the objection procedures established by the Bar in rule 2-9.3 accomplish the required "objective...of preventing compulsory subsidization of ideological activity by [Bar members] who object thereto without restricting the [Bar's] ability to require every [member] to contribute to the cost of [permissible] activities." *Id.* at 302, 106 S.Ct. at 1074 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800).[12] We consider Gibson's contentions in turn.

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12 This application of *Chicago Teachers* is consistent with the Supreme Court's recent decision in *Keller v. State Bar*, ___ U.S. ___, 110 S.Ct. 2228, ___ L.Ed.2d ___ (1990). In *Keller* members of the California State Bar challenged the Bar's use of mandatory dues to finance political activities. The Supreme Court applied the rule in *Abood* that unions, and by implication bar associations, cannot fund political activities from the mandatory dues of employees or bar members who *object* to such expenditures. *See id.* The Court pointed to Chicago Teachers as the case in which the Court "outlined a minimum set of procedures by which a union...could meet its requirement under *Abood*," *id.* ___ U.S. at ___, 110 S.Ct. at 2237, that is, by which the union or bar could ensure that objecting members' dues were not used to finance the political activity at issue.

Unlike the Florida Bar in the present case, however, the California Bar provided no procedures for handling bar members' objections to such expenditures. The Court in *Keller* thus addressed the California Bar's broader argument that *Abood* did not apply to its use of compulsory dues to finance political activities because the Bar was a state agency and therefore could use the dues for any purpose within its broad statutory authority. *See id.* ___ U.S. at ___, 110 S.Ct. at 2228. The Supreme Court rejected this argument and held that the Bar was subject "to the same constitutional rule [under *Abood*] with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* ___ U.S. at ___, 110 S.Ct. at 2235. The Court then suggested what kinds of expenditures, at "the extreme end[] of the spectrum," *id.* would implicate that rule and remanded the case for further proceedings consistent with the opinion.

The Court in *Keller* thus reaffirmed the holdings of *Abood* and *Chicago Teachers* and expressly applied those holdings to state bar associations as well. Because the case before it lacked a developed record regarding possible procedures to satisfy this requirement, however, the

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Gibson first argues that the Supreme Court cases require the Bar to provide an advance deduction for the proportion of dues that the Bar knows will be used for political activity. In response, the Bar contends that the cases clearly approve an interest-bearing escrow account as an alternative. In addition, the Bar claims that an advance deduction would not be feasible. It argues that when Bar dues are assessed on July 1, the Bar does not yet know what political activity it will undertake in the coming year. Moreover, it does not spend a fixed amount on political activity from year to year.

We reject Gibson's reading of the caselaw on this point. In *Ellis v. Railway Clerks*, 466 U.S. 435, 433-44, 104 S.Ct. 1883, 1889-90, 80 L.Ed.2d 428 (1984), the Supreme Court invalidated a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or interest-bearing escrow accounts*." (Emphasis added.) The Court restated this proposition in *Chicago Teachers*, 475 U.S. at 303-04, 106 S.Ct. at 1074 (quoting *Ellis*), and stated that "an escrow for the amounts reasonably in dispute," along with an adequate explanation of the fee and an opportunity to challenge the amount, would satisfy the constitutional requirements for an objection procedure, *id.* at 310, 106 S.Ct. at 1078. These statements provide indisputable authority that an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient. Gibson would have us believe that these

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Court declined to conduct any analysis of what procedures would satisfy the mandate of *Chicago Teachers* under the circumstances in *Keller*. *See id.* ___ U.S. at ___, 110 s.Ct. at 2237-38. The present case, in contrast, involves exactly such an issue concerning the Florida Bar's objection procedures. We therefore undertake to analyze those procedures under *Chicago Teachers*–an undertaking which is entirely consistent with the Supreme Court's recent pronouncements in *Keller*.

statements are merely dicta and thus not controlling. He suggests that every objection procedure approved by the Supreme Court has involved an advance deduction. In light of the Court's express approval of a proportionate escrow in *Chicago Teachers*, we reject Gibson's argument.

Gibson also challenges rule 2-9.-3(e)(4), which provides for the calculation of interest on refunds after arbitration only "as of the date the written objection was received."[13] We hold that this formula for calculating interest is not sufficient to "avoid the risk that [the objecting members'] funds will be used, even temporarily, to finance ideological activities," *Abood*, 431 U.S. at 244, 97 S.Ct. at 1804 (Stevens, J., concurring). By calculating interest only "as of the date the written objection was received," the Bar can use the interest generated by the members' dues from the time of payment in July until the time of the objection. As the Bar has argued, it may not begin its lobbying until later in the year. Even if a member objects promptly after receiving notice of the Bar's position in the Florida Bar News, the Bar can still make use of the interest generated from the member's proportionate share until that time. We therefore find Gibson's attack on this point to be persuasive.[14] In order to protect against the danger that the objecting members' funds will be used in this way to finance the Bar's political activity, the Bar would have to calculate interest as of the date that payment of the members' bar dues was received.

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13 As we note above, *supra* note 10, rule 2-9.3 does not specify whether refunds issued without arbitration (within forty-five days after the Bar receives a written objection, pursuant to section (c)(2)) include interest. At oral argument, the Bar asserted that its refund procedures included interest payments. Based on this representation, we assume that refunds pursuant to section (c)(2) include interest, which is calculated in the same fashion as interest on refunds pursuant to section (e)(4).

14 Our holding applies as well to the calculation of interest on refunds issued pursuant to section (c)(2).

2.

Gibson next contends that the Bar's procedures impermissibly require dissenting members to object on an issue-by-issue basis, thus forcing them to identify their own political positions. The Bar responds that members need only make a generalized objection that a given issue is not closely enough related to the Bar's purposes to justify an expenditure of compulsory dues. The Bar claims that such an objection does not impermissibly require objectors to disclose their own position regarding the issue. We agree.

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." *Chicago Teachers*, 475 U.S. at 306, 106 S.Ct. at 1075 (citing *Abood*, 431 U.S. at 239-40 & n. 40, 97 S.Ct. at 1801-02 & n. 40). This burden "is simply the obligation to make his objection known." *Id.* 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16. The affirmative objection requirement here is within the scope of this obligation. It merely requires the objector to inform that Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue. We therefore reject Gibson's challenge on this point.

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Finally, Gibson challenges the composition of the arbitration panel under rule 2-9.3. He claims that the panel is impermissibly composed of Bar members, who necessarily have an interest in the arbitration's outcome. The Bar responds that an arbitrator's mere membership in the Bar is insufficient to taint the arbitration proceeding. We agree with the Bar.

Chicago Teachers the Court held that the arbitration procedure was objectionable because it was "from start to finish . . . entirely controlled by the union." 475 U.S. at 308, 106 S.Ct. at 1076-77. Under the procedures in that case, the union itself selected a single arbitrator. The procedures here are clearly distinguishable. Rule 2-9.3 provides for a tripartite arbitration panel, and although the Bar picks one panel member, the objector picks another, and the third is chosen by the first two members of the panel. Thus, the Bar has nowhere near the degree of control over the arbitration process that the union had in *Chicago Teachers*. Given the nature of arbitration panels in this case–composed of arbitrators representing the competing parties' interests-whatever interest the arbitrators might have in the outcome as members of the Bar has no significance whatsoever. We therefore reject Gibson's challenge on this basis as well.

III.

For the foregoing reasons, we hold that the Bar's procedures for handling objections to its political lobbying are sufficient except for the formula for calculating interest on refund payments. The district court's decision is therefore AFFIRMED in part and REVERSED in part.

IT IS SO ORDERED.

CLARK, Circuit Judge, dissenting:

I dissent. I agree with appellant Gibson. His position is stated by the majority (Slip Op. at 3879, ___ F.2d at ___): "[Gibson's] primary contention is that the Supreme Court cases in this area require an advance deduction rather than a refund." In affirming the district court on this point, the

majority fails to follow the precedent of *Gibson I*,[1] which held:

> The *Abood* court concluded that a union may not spend compelled fees for the advancement of political views or ideological causes that are not incidental to the union's role as bargaining unit.... Stated another way, "*Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees."
>
> * * *
>
> The similarities between union dues and integrated bar dues are so substantial that we may safely transpose the *Abood* holding to the facts presented in this appeal as follows: the Florida Bar may use compulsory Bar dues to finance its Legislative Program *only* to the extent that it assumes a political or ideological position on matters *that are germane to the Bar's stated purposes*. (Emphasis added.)
>
> * * *
>
> The proper focus in this action should be upon the actual results of the Bar's Legislative Program, *i.e.*, whether past positions of the Bar were sufficiently related to its purpose of improving the administration of justice. On this issue, *the Bar bears the burden of proving that its expenditures were constitutionally justified*. (Emphasis added.)

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1 *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986).

Gibson I, 798 F.2d at 1567-69 (citations omitted). There is no dispute about the fact that the Bar has never established that "its expenditures were constitutionally justified."

The majority simply misreads *Chicago Teachers Union v. Hudson*.[2] The panel says, "The union also established procedures for handling nonmembers' objections about the deductions." (Slip Op. at 3880, ___ F.2d at ___). The panel compares the procedure there to the procedure in the Florida Bar rule. The panel overlooks that the nonmembers in *Chicago Teachers* were only paying 95% of the union dues as a consequence of the union making advance deductions for activities not germane to pure union objectives. As described in *Chicago Teachers*, 475 U.S. at 295, 106 S.Ct. at 1070, the union identified expenditures unrelated to collective bargaining and contract administration for the past year and found them to be approximately 5%.

The union in *Chicago Teachers* did exactly what appellant Gibson is asking our court to require the Bar to do in this case. It deducted in advance that portion of the dues allocable to those expenditures it acknowledged to be unrelated to collective bargaining and contract administration. The union then went on to establish a procedure where nonmembers could object to expenditures by the union of payments from any part of the 95% used toward legislative and political activities which were nevertheless still anathema to those nonmembers. The panel adopts this latter procedure without requiring the Bar to deduct in advance that part of

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2 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

Gibson's dues which can be approximated from experience to be allocable to non-administration of justice lobbying activities.[3]

Such "non-administration of justice" lobbying was identified in note 1 of *Gibson I* as positions that had been taken by the Florida Bar in the past: "(1) opposed tort reform; (2) opposed limitation of damages in medical malpractice actions; (3) opposed changes in the state sales tax; (4) opposed changes in the state's taxation and venue powers; and (5) advocated regulation of child care centers." *Id.* at 1565 n. 1.

The panel in note 4 of *Gibson I* identified as acceptable areas for Bar lobbying to bee: "(1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards." *Id.* at 1569 n. 4. It is the law of the case that the Bar has in the past

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3 The majority accepts the Bar's argument "that advance deductions would not be feasible" because the Bar claims it "does not yet know what political activity it will undertake in the coming year." This is rebutted in the Court's recent opinion in *Keller v. State Bar of California*, ___ U.S. ___, 110 S.Ct. 2228, ___ L.Ed.2d ___ (1990). The Court specifically states it is in agreement with Justice Kaufman's dissent in the California Supreme Court case where he said:

> Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof.Code § 6140.1), the argument that the constitutionally mandated procedures would create 'an extraordinary burden' for the bar is unpersuasive. 'While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, *and have operated successfully within the parameters of Abood procedures for over a decade*. [47 Cal.3d 1152, 255 Cal.Rptr. 542, 568] 767 P.2d 1020, 1046. (Emphasis added.)

expended members' dues for lobbying activities unrelated to the administration of justice. Gibson won his case before the first panel and loses here by not being afforded a remedy. He is entitled to the same relief allowed to the plaintiffs in *Abood*, *Chicago Teachers*, and *Ellis*.

In *Chicago Teachers*, the Supreme Court opens with this quotation:

> In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, *collect from dissenting employees any sums for the support of ideological causes not germane to its duties* as collective-bargaining agent." *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984). (Emphasis added.)

475 U.S. at 294, 106 S.Ct. at 1069, 89 L.Ed.2d at 239. By permitting the Florida Bar to *collect* dues from the dissenter Gibson and then requiring him to notify the Bar of those

individual lobbying activities to which he objects,[4] the majority pays little or no attention to Supreme Court authority and our prior panel opinion.

The majority also misapplies *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 780 L.Ed.2d 428 91984). The majority quotes the Supreme Court as invalidating a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or interest-bearing escrow accounts.*" (Slip Op. at 3882, ___ F.2d at ___). But the Court went on to say, "Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Ellis*, 466 U.S. at 444, 104 S.Ct. at 1890, 80 L.Ed.2d at 439. The Bar plan is a pure rebate plan which places the burden of proving the impropriety of the Bar's expenditure upon the member and uses Gibson's dues until he complains. These features of the Bar's plan have been declared unconstitutional in several Supreme Court cases.

For the foregoing reasons, I dissent.

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4 The majority rejects Gibson's First Amendment claim that he should not be required to identify on an issue-by-issue basis those political positions to which he objects. Again the majority ignores *Abood* which holds:

> But in holding that as a prerequisite to any relief each appellant must indicate to the Union the *specific* expenditures to which he objects, the Court of Appeals ignored the clear holding of *Allen*. As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

97 S.Ct. at 1802-03 (emphasis in original; footnote omitted).